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## ABSOLUTE POWER, AN AMERICAN INSTITUTION.\*

It is the peculiar province of this Association to study those principles upon which American society is based and by which its conditions are controlled.

Laws may be passed and repealed in quick succession; individuals may rise to positions of commanding influence, only to be swept off in a moment into political oblivion, by a sudden turn of party tide; the rules of science, the inductions of philosophy, accepted for ages, may, as some new door of Nature's laboratory is unlocked, shrivel into ashes before the issuing flame; but in every land, civilized or barbaric, where a strong race has long made its home, there will be certain institutions of civil society, that have grown up to slow maturity, so rooted in the soil, that they form part of the nation's life, and make its history.

It is to such an institution that I desire, this evening, to direct your attention—an American institution, and one that, as the centuries roll on, is destined, I believe, to exercise greater and greater power in determining our country's destiny.

Among the constitutional governments now existing in the world, the United States rank as the oldest but one. It is, indeed, fairly open to question if our place is not the first. Great Britain, since our Constitution was adopted, by her union with Ireland and the introduction of a hundred Irish members into her House of Commons, followed by the Reform Bill and the recent Franchise Acts, has essentially changed the character of

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\*Being the annual address, delivered August 30, 1897, before the American Social Science Association, at Saratoga. The main body of the address was also delivered before the Georgia State Bar Association, at Warm Springs, Georgia, July 1, 1897.

that body, and transformed a monarchy into a representative democracy; while the new name of Empress of India, given to her titular sovereign seems but to mark the abandonment of her ancient colonial policy, too mild for an oriental race, too rigorous for the great English-speaking dominions that have risen up under her flag, to gain for themselves, one after another, substantial autonomy.

The United States are the offspring of a long-past age. A hundred years have scarcely passed since the eighteenth century came to its end, but no hundred years in the history of the world has ever before hurried it along so far over new paths and into unknown fields. The French Revolution and the first empire were the bridge between two periods that nothing less than the remaking of European society, the recasting of European politics, could have brought so near.

But back to this eighteenth century must we go to learn the forces, the national ideas, the political theories, under the domination of which the Constitution of the United States was framed and adopted.

There is something in that instrument that gave it coherence and vitality; something on which we have built up institutions that are real, traditions that are imperious, a national life that is organic, a national history of which no civilized man is wholly ignorant, a national power that is respected on every sea.

What is it that has brought us on so far, and given us an undisputed place among the great powers of the world? Is it a broad land and a free people, equal laws and universal education? Yes; but how are those laws administered? How are the forces of this great government that rules from sea to sea across a continent, directed and applied? How, and by whom?

I think it may be fairly said that of the leading powers of the world, two, only, in our time, represent the principle of political absolutism, and enforce it by one man's hand. They are Russia and the United States.

The Czar of Russia, indeed, stands for Russia in a broader sense than that in which we can say that the President of the United States stands for them. The people of the United States have not put all their power in the keeping of all or any of their temporary rulers. They are the sleeping giant, that sleeping or waking is a giant still. Their word is still the ultimate rule of conduct—their written word. But when they gave their assent to the Constitution of the United States, they created in it the office of a king, without the name.

They set the key, also, by this act, for our State governments and municipal governments.

The royal prerogative of pardon, which belongs to the President without limits, except in cases of impeachment, has been given to one after another of the Governors of our States. Their appointing power is like his; their veto power is like his. Of the statutes passed this year by the legislature of the State in which we are convened,<sup>1</sup> nearly one-third—in all, over five hundred—failed of effect for want of the Governor's approval.

In city governments the authority of the Mayor has been continually increased. He is held personally responsible for a fair and honest administration of municipal affairs, and each department under him is coming to be under the direction, not of some non-partisan board, but of one man, removable at the Mayor's will, and taking his instructions from him.

But the hour which is allotted to this address will only suffice for a brief and partial consideration of the centralization of power in the Federal Government.

In form, at least, there is less of national character in our executive than in our judicial department. The Judges of the United States have no relation to the States, except that the Senate of the States must confirm their nominations. The President, on the other hand, is chosen by the votes of local electors, appointed by each State for itself, and meeting separately in distant capitals. Three of these electoral votes are forever secured to the smallest State, so that a President may be—as, in the case of Hayes, a President was—elected by a majority in the electoral colleges, when the opposing candidate received the approval of a majority of the whole people. So, again, should the electoral colleges fail to make a choice, the States come together to take their place, like so many sovereign powers in an imperial diet; each casting in the House of Representatives an equal vote.

But, once elected, the President, during half the year is the United States more truly than ever Louis XIV was France.

Our people had tried, during the Revolution and after the Revolution, the experiment of a confederacy without an executive head. They knew the evils of a weak administration, and they were determined to have an energetic one. They were ready to pay the price by submitting to a system of personal government.

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<sup>1</sup> New York.

Had there not been, in 1787, a person at hand, to whom all eyes were turned with unfaltering trust, it is more than doubtful whether the Constitution, as thus framed, could have been ratified. Had they fully understood the great powers with which it invested the President, it is certain that it never would have been.

Hamilton and Madison in the *Federalist*, minimized these powers, to conciliate popular support. It was, in truth, impossible to predict beforehand what they were to prove. Pinckney, at the close of the convention, spoke of the new President as an officer of "contemptible weakness and dependence." Jefferson, on the other hand, wrote from Paris that he seemed "a bad edition of a Polish King," and would contrive to hold his power by successive reëlections for life. Between these views time was to decide.

A constitutional government is not constructed in a day. A constitution may be; but it is born into the world a helpless babe, to be nurtured and re-created by its environment and associations. Constitutions do not make history. History makes them. They may, indeed, be constructed in a day, but they cannot be construed in a day. The men who put such a document together do not know, cannot know, the meaning of their own work. It is what it comes to be. It is what later generations make it.

Plato tells us in his Republic that governments must change with every change in the character of those who constitute the political society, and in their relative conditions of life.

Think of the United States as they were in 1787, occupying a narrow strip of the Atlantic sea-coast; engaged only in agriculture; with no city larger than Utica or Savannah now is; with capital still so far in the hands of individuals that there were probably not a hundred business corporations in the whole country; with mails carried through half the States on horse-back and at irregular intervals, if at all; and tell me if the President of such a people could, except in name, be the same as the President of the United States of to-day?

There were two theories of the executive before the convention of 1787.

Sherman insisted that the executive magistracy was really nothing more than an institution for carrying the will of the legislature into effect, and therefore that it should be confided to one or more officials, as experience might dictate, appointed by that body and removable by that body.

Madison contended for the other view, that the executive was a representative of the people, rather than of their legislators.

During the century that has passed since then, England, following the principle preferred by Sherman, has reduced her sovereign to a mere representative of the legislative will; and we, following the principle preferred by Madison, have raised our Executive to the position of an elective King, chosen by the people, and responsible only to them—a King who, for a four-years term, rules in his own right.

One of the most significant debates in the convention of 1787 was that over the proposition to surround the President with an executive council. Had it been carried, and his will thus subjected in any measure to cabinet control, the very foundation of our government would have been changed. It is the absolute supremacy of the President within his sphere of executive action, responsible to his own judgment, and to no other man's, that has been the mainspring of our political system. Custom and convenience have brought the heads of departments together, in the presence of the President, at stated meetings for consultation, and, when he asks it, for advice. We call them members of the Cabinet; but they have as such, no standing before the law. No Sultan in the presence of his divan is as uncontrolled and absolute as the President of the United States at a Cabinet meeting. Others may talk; he, only, acts.

It was an observation of Sir Henry Maine, that the success of the United States "has been so great that men have almost forgotten that if the whole of the known experiments of mankind in government be looked at together, there has been no form of government so unsuccessful as the republican."<sup>2</sup> And why unsuccessful? Because it was always inefficient in emergencies. Because it had no political center. Because no free people had been intelligent enough to know that a strong and stable government is the best government, provided it is first kept within narrow bounds, and then administered in the public interest.

The first step towards strengthening the executive power was taken by the first Congress in its decision in favor of the right of the President to dismiss his subordinates at will. The *Federalist* had adopted the other view. The argument that if confirmation by the Senate were necessary to appointment it must also be necessary to removal, was logical; but in politics

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<sup>2</sup> "Popular Government," p. 202.

practical considerations are often stronger than logical ones. If the President was invested with the whole executive power of the United States (and so the Constitution reads); if he is to be held responsible to the people for his executive action (and certainly he must be); he ought to have no agent in his service who has lost his confidence; no man on whose judgment he must rely, whose judgment he distrusts.

In the form of constitution adopted by the Southern Confederacy in March, 1861, the President's power of removal was essentially restricted. It should have been; for the guiding principle of that short-lived government was to secure at every point where it was practicable the sovereignty of each State, and to yield as little as possible to the confederate authority.

During the administration of Washington came another step in the development of the Constitution, in the act on his part, which nearly precipitated us into a war with France. The President, says the Constitution, is to receive public ministers. It follows, said the first President, that I can refuse to receive them, or, if I find reason to be dissatisfied with them, can request their recall. Genet was recalled, at his request, and the beginning thus established of a long line of diplomatic precedent, which has made the voice of the President, as to foreign nations, the only recognized expression of the sovereign will of the United States.

Federal taxation was no more popular under Washington than it is under McKinley. It became necessary for the government to show its teeth, and in 1792 was passed the first national militia law. In case the execution of the laws of the United States should be opposed in any State by combinations too powerful to be suppressed by the courts or marshals, it was made lawful for the President to call out the militia of the State, and should they refuse to act and Congress not be in session, the militia of other States, in such numbers as he might think necessary. It was also provided that every able bodied white male citizen, between eighteen and forty-five, with few exemptions, should be enrolled in the militia, and that the President should appoint an adjutant-general in each State to act as such, subject to the orders of the Governor. It was by virtue of these acts that Washington found the means to put down the Whiskey Rebellion in Pennsylvania; and while the general policy of Congress has since been to trench less on the military powers of the States, the militia of the United States, such as it is, has necessarily and always, when in actual service, been under the com-

mand of the President by constitutional right, and as the Supreme Court decided in *Martin v. Mott*,<sup>3</sup> it is for him alone to determine when it is fit to call them out.

So, in regard to our standing military and naval establishment, the orders of the President are always absolute.

They may involve the pulling down or setting up the government of a State. Such was the effect of Presidential interposition in Dorr's Rebellion in Rhode Island, when the Courts declared<sup>4</sup> that whichever government he recognized as the true and lawful one, they must respect.

They may bring a sudden stop to combinations of labor, which have put great railroads at their feet, and the commerce of the country in peril.

They may compromise our relations with foreign powers, and even authorize an invasion of foreign territory or the blockade of ports<sup>5</sup> before Congress has declared the existence of war.

And when a state of war is fully recognized, what shall we say then of the limits of Presidential power? As it was practically administered during the civil war, it extended, in States that were not the seat of active hostilities, to domiciliary visits; to arrests by military warrant; to trials by military courts, ending in decrees sometimes of exile, and sometimes of death. The courts and the bar, as you well know, were at the time divided in opinion as to the question of right. The Chief Justice of the United States denied that the President could suspend the privilege of the writ of *habeas corpus* where there had been no proclamation of martial law; but even he did not venture to enforce his decision by process of contempt. At this point Taney yielded before Lincoln, as Marshall had yielded before Jefferson as to the subpoena issued and disobeyed, on the trial of Aaron Burr. Finally, after the close of the war, came the decision in *Milligan's case*, annulling a sentence of death passed by a military commission, sitting in Indiana, for a political offense; but a decision rendered by a divided court, four of the nine judges, with the then Chief-Justice at their head, holding that, in time of insurrection or invasion, the President might rule by martial law, when public danger required it, and there was no opportunity for Congress to act, in any part of the United States, though not the actual seat of war, if he found the ordinary law inadequate for public protection.<sup>6</sup>

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<sup>3</sup> 12 Wheat. 19.

<sup>4</sup> *Luther v. Borden*, 7 How. 1.

<sup>5</sup> *The Prize Cases*, 2 Black. 635.

<sup>6</sup> *Ex parte Milligan*, 4 Wall. 2, 142.



It was Macaulay's criticism of the Constitution and government of the United States that we were "all sail and no rudder." He uttered it in the first half of the century, that half divided for us by so wide a chasm from that now closing—the chasm of the Civil War.

No one who watched the progress of that great contest would have failed to see that there was rudder, no less than sail. There was a rudder, and there was but one man at the helm. Lincoln's course may be commended or condemned, but this, at least, all must agree, that his personality dominated the course of political events during those stirring years from 1861 to 1865. It was far from being a consistent course. The Constitution, on his accession to the Presidency, did not seem to him the same thing that it grew in his mind to be, as the long struggle wore on. He came to feel, as he wrote in 1864, "that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the nation." This is a doctrine without limits, in the mouth of a military commander in time of war. It led him to the proclamation of emancipation, as imperial a decree as that by which the Czar of Russia, in the same year, abolished serfdom in his dominions. We need not stop to ask whether this proclamation was a legal act. It is one of the great facts of human history: its practical consequences were immeasurable, and whatever else it accomplished, it demonstrated the absolute power of an American President, whether it be rightfully or wrongfully exercised.

But it is not to times of war that one should look for authoritative definitions of political powers. Those of every department of government are then commonly strained to the utmost, and all tend to support the military arm.

When Lincoln assumed to suspend the privilege of habeas corpus, Congress came to his aid by an Act<sup>7</sup> formally investing him with such a power, to be exercised anywhere and at any time at his discretion, and granting immunity for any acts in restraint of liberty done at his command. Similar action was taken in the Confederate Congress to strengthen the hands of President Davis, and his influence in shaping legislation was even more evident and effective, throughout the war, than that of President Lincoln at Washington.

Let us go back to times of peace and ask which President was the first to startle the country by the exercise of powers not before generally thought to appertain to the Executive Department.

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<sup>7</sup> Of March 3, 1863.

It was Jefferson, when in 1803 he bought the Louisiana territory from Napoleon, and by a stroke of his pen doubled the area of the United States. It inevitably moved the center of political rule to the valley of the Mississippi. It destroyed the existing balance of power between the States. But it was fortunate that under our political system there was one man able thus to commit the country, without consulting it, to so great a departure from its earlier traditions.

A generation later, another executive act proved that the President was stronger than any combination capital could form, though supported by far-reaching political influences. The United States Bank was the greatest financial institution which the United States have ever seen. It had paid a million and a half to the government for its charter. It was made by Act of Congress the standing depository of the cash funds of the United States, unless at any time the Secretary of the Treasury should order their withdrawal. President Jackson believed that the affairs of the bank were being improperly conducted, and requested the Secretary of the Treasury to remove the deposits. The Secretary declined, stating that he saw no reason for it, and that the authority to decide had been lodged with him. His removal followed, and a successor was appointed who promptly complied with the President's wishes. The Senate denounced Jackson's action as unwarranted by the Constitution. He sent in a protest against this resolution which they voted to be a breach of privilege. A commercial crisis followed, which shook the country to its foundation, and by one of the great parties of the day was attributed to Jackson's act. Whether the cause of it or not, the removal of the deposits was certainly the occasion, and it came by the absolute will of the President alone.

It was Jackson, also, who first showed the people how almost irresistible, in strong hands, and on great occasions, is the force of the executive veto. It is the common prerogative of royalty, but one to which modern royalty seldom dares to resort.

Queen Victoria has, in law, the same absolute veto power as to every bill which Parliament presents to her for the royal assent, which Queen Elizabeth or William the Conqueror had. But does she use it? No English sovereign since the Hanoverian dynasty came in has ever used it, and none ever will. And why? Because it is an absolute power, and because no men of Anglo-Saxon stock will ever again stoop to absolute power, exercised by hereditary right.

The disuse of the royal veto has brought on a silent but fundamental change in the whole system of British government. The ministry, unwilling to ask the sovereign to approve a bill that they do not, if such a measure is forced upon them, resign their offices or dissolve the Parliament. As the Crown cannot be held responsible to the people the ministry must be—a vicarious sacrifice at the altar of liberty.

In every form of government that stops short of despotism, the people must have some share or some semblance of a share in legislation, either by way of origination or approval.

In the palmiest days of monarchy in France the edicts of the King were submitted for registration to the parliaments of justice; and the convocation of the States General was always in reserve. Under the reign of the Cæsars the absolutism of the Emperor was rested on the assumption that the people had delegated to him their powers and the functions of their tribunes to intervene for them to defeat an unjust law.

But the American veto is supported by no legal fiction, and impeded by no fear of popular discontent. During his short term of office, and because of his short term of office, the President of the United States may set down his foot at any point and oppose his individual will to the judgment of the whole people speaking by their representatives, and of all the States, speaking by their ambassadors in the Senate. If such a veto is sent in during the closing days of the session, as Congress is now constituted, with so great a number of members in each of the houses, and the opportunity for unlimited discussion in one, it is almost certain to be fatal to the bill; and under any circumstances it is fatal, if the President and Congress are in general political accord.

But if they are not, what then? He has a greater prerogative in reserve.

The executive power of the United States, and the whole of it, is vested in this one man. What are laws, if they are not executed? And who is to judge, except the President, or above the President, whether an Act of Congress, which he is called upon to execute, is or is not such an Act as Congress had power to pass?

We have, indeed, now passed from questions of expediency to questions of jurisdiction.

The President can veto a bill because he deems it inexpedient, or because he deems it unconstitutional. He can only decline to execute a statute which has become such without his

approval, because he believes it to be no law at all. But the absolute power of decision, and of action or inaction, in either case, is equally in him.

This was the position of Jefferson and of Jackson, but it required the civil war to make it an unquestioned principle. You recollect the occasion. In every one of the States South of Kentucky society was confused and disorganized. The *status* of almost half the population had been revolutionized. The natural political leaders had been set aside. A general re-adjustment of civil government to meet all these new social conditions was necessary. President Lincoln and after him President Johnson proposed to accomplish it by the exercise of the executive power. Temporary governments were set up under military authority. Executive orders were issued, authorizing popular elections, under certain conditions, to replace military by civil rule, and home rule. Congress interposed to prevent it. The "Reconstruction Laws" were enacted, and others, intended to subordinate the President of the United States, as to military affairs to the General then in command, and, as to civil administration, to the will of Congress. These Acts were vetoed. They were passed over the veto. They were disobeyed. The President was impeached, and the one vote that saved him from conviction, I might almost say, re-made the Constitution of the United States. If such a President as Andrew Johnson, so defiant of opposition, so abusive to his opponents, so distrusted by the party that had elected him, on the one side, and by the party which had rejected him, on the other, could not be successfully impeached for following out, in matters so all-important to the people and the States, his view of the Constitution against that of Congress, no President ever could be.

The same thing is true of a difference of opinion as to his constitutional duty, between the President and the courts. You recollect Jackson's declaration, when he vetoed the re-charter of the United States Bank, that he had sworn to support the Constitution as he, not others, understood it, and that the authority of the Supreme Court must not be permitted to control either Congress or the Executive when acting in their legislative capacities. It was left for another Tennessean, in another generation, to vindicate the doctrine that the President was equally independent of the courts, when acting in his executive capacity.

Can the President be prevented from executing an Act of Congress which the Supreme Court considers to be unconstitutional and void?

This was the great question which Mississippi brought to the bar of the Supreme Court of the United States in 1866.

The Reconstruction Acts, to which I have alluded, purported to set aside the existing governments of certain States—governments existing by the authority or sanction of the President as Commander in-chief of the military power of the United States. Mississippi was one of these. She asserted that these statutes were unconstitutional and void, and sought leave to file a bill for an injunction to prevent President Johnson from undertaking to enforce them. No one would have been better pleased than he, to see them fail. But he knew that it was his duty to defend the dignity of his great office. By his direction the Attorney-General opposed the motion of the State of Mississippi. It was denied, and the cause of *Mississippi v. Johnson*<sup>8</sup> established by judicial decision what had been only feebly and sporadically claimed by Johnson's predecessors, that the President was the absolute judge of his duty in the execution of a statute, subject only to the power of the courts to pass upon the legal effects of his action, should they afterwards become proper matters of judicial controversy.

We have seen how far the military powers of the Executive may serve as a warrant to interfere with the administration of justice in State courts. In time of war and in the presence of war, it extends to their temporary abolition. When enemies' territory is occupied, or territory to which the rules of public law assign that name, though it be that of a State of the Union, the President can replace its courts by courts of his own, exercising both civil and criminal jurisdiction, and disposing of life, liberty and property, not as instruments of the judicial authority of the United States, but as instruments of the executive authority. Such was President Lincoln's Provisional Court, established by a mere military order in Louisiana in 1862. Four years later Congress ordered its records transferred to the Circuit Court for the Eastern District of the State, and made its judgment in legal effect the judgments of that court.

The validity of this legislation was attacked, but it was finally supported by the Supreme Court of the United States,<sup>9</sup> and under this decision, in the case of the *Grapeshot*, what were really decrees of the President, speaking by his military deputy, the judge of the Provisional Court, were made to stand for and

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<sup>8</sup> 4 Wall. 475.

<sup>9</sup> The *Grapeshot*, 9 Wall. 129.

virtually become, by legislative action, the judgments of a regularly constituted judicial tribunal, which could only have pronounced them by virtue of its judicial powers.

But how far, in time of absolute peace, can the President of the United States, in the exercise of his civil authority, interfere with the police of a State, and set aside its ordinary course of justice? Let *Neagle's case*, which arose from threats of violence against Mr. Justice Field of the Supreme Court, give the answer. The President can surround civil officers of the United States, within a State, with armed guards, who can defend them, even to the death, without responsibility to the State whose peace may be disturbed. He may send such guards in the train of every judge upon the circuit, and however they may overstep the line of duty, the State cannot call them to account. There is, says the Supreme Court, a peace of the United States as well as of the State, which is broken by an attack upon such an officer, and although the peace of the State be also broken by the defense, this can be determined only by the courts of the United States.<sup>10</sup>

I have spoken of the President as the sole representative of the United States in our dealings with foreign nations, except, indeed, that the ordinary executive prerogative of declaring war has not been confided to him. If he cannot declare war, however, he can create one.

Take, for instance, his power, to which I have already alluded, of receiving foreign Ministers. To receive them as coming from what foreign sovereigns? From such, and such only, as he may choose to recognize as sovereign. From Hawaii, if he chooses to recognize the Hawaiian Republic. From Cuba, if he chooses to recognize the Cuban Republic. Such an act of recognition, in case of a political revolution that has obtained temporary success, may obviously constitute a *casus belli* in favor of the former government, should it ultimately prevail.

In all America that lies South of us we have long taken an especial interest. As to the foreign relations of our sister republics there, we may almost say that our will is law; and our will is uttered by our President. Let one of these republics complain to him of encroachments threatened by an European power. It is Mexico, struggling to free herself from an Austrian Emperor sent and supported by Louis Napoleon. At a few words from our Department of State, in the name of President

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<sup>10</sup> *Neagle's Case*, 135 U. S. 1.

Johnson, the French troops are recalled, and Maximilian is led to execution. It is Venezuela, charging England with pushing too far the boundaries of British Guiana. A sudden message to Congress from President Cleveland asks for the appointment of a commission to aid him in determining which nation is in the right and intimates that if Venezuela proves in the right she shall have right done. In an hour, by this executive act, we are brought face to face with a question of war with the leading power in Europe, and the danger of it passes away through a diplomatic correspondence for the issue of which the President was again alone responsible.

The very ground of our interference in this quarrel of Venezuela—what was it but a doctrine proclaimed, and indeed invented, by a President of the United States? The Monroe Doctrine has laid down the law for our hemisphere, and it was the single act of one executive department.

Has any sovereign in Europe, of his own motion, ever done as much?

The place of the President in our government was prepared for those who could be safely trusted with imperial power—for ideal heroes of the nation whom the leaders in each State, chosen by the people for that sole purpose, in the secret conclave of the electoral college, might agree on—must agree on—for in no nation at any time can there be more than one to whom all true men look as the foremost citizen.

The framers of the Constitution sat in convention under the Presidency of such a hero. It was for Washington that they prepared the place of President of the new Republic. It was by such as Washington that they hoped the powers of this great office would be administered, when he should fill it no longer.

Their forecast has been but half fulfilled. The electoral colleges have sunk to the condition of so many patent voting machines. They are a survival of the unfittest. Human government, like natural government, is administered, in the long run, on the principle of natural selection; but we are more apt to change the substance than the form of political institutions. England has slipped into a republic without knowing it. They keep their Queen, indeed, and are proud of her reign of sixty years—how proud, the pageants of this summer have well shown—but she is little more than a historical curiosity. Our Presidential electors were brought into being as the safest and surest way of declaring the will of the people. We have found a better way, in national conventions of great parties and the

popular verdict upon their work, at the polls; but, by the force of the *vis inertiae*, we still cling to the out-worn form of the electoral college.

The tailors persist in sewing two buttons on the backs of our coats, because in the England of the Tudors, when all traveling was done on horseback, one had to button back the skirts of his riding coat, to keep them from flapping and fraying against the saddle-bags. The tailor is the despot of modern society, and he still insists on his two buttons, though we have forgotten their use; and so the electoral colleges seem destined to cling to the skirts of the Constitution, simply because nobody cares to take the trouble to have them cut off.

Their purpose was good, but it has become an impossible one. Only a great war can give us, again, a national hero, and even then the successful General can never be President unless he is formally adopted as the candidate of a great party.

The successors of Washington have been often weak men; never, as yet, bad men; but it is hard to name more than three of them who can in any sense be termed the heroes of the nation. The great powers, however, are always there, if the great man is not; and every generation has made them powers greater still.

Time has also brought a greater permanence to them.

Thrones are allowed to descend by hereditary succession, because it is believed that the son is most likely to follow the policy of the father, and to resemble him in character.

The election of our Vice-President is arranged with a similar view; but for a hundred years the vacancy that might occur by the event of his death was left by Congress to be filled by officers chosen by one or the other House of Congress.

What might have been expected, finally happened. A Vice-President became President, and the legislative officer next in succession was of a different political party. It was a time of deep party feeling, and there was serious danger that the President might be pushed from his place to make room for a representative of widely different views; coming into power, perhaps, by his own vote as a member of a Court of Impeachment. Twenty years later, when passion had had time to cool, a wiser law was enacted under which the President, in such a case, names, in effect, his own successor, and so secures the continuance of the same policy until the people have had another opportunity to declare their will.



Aristotle said that the principle or spirit of two governments, widely different in political form, might be the same.

The principle of despotism may exist in any government. It may dominate in a democracy. It does when the popular majority legislates at will on matters of individual liberty or property. Despotism was never more terrible than in the hands of the people in the French Revolution.

We need not be surprised, therefore, that beginning in 1787, by granting our President more extensive powers than the Chief Magistrate in any democratic confederation had ever received before in times of peace,<sup>11</sup> we have finally drifted into a kind of modified constitutional despotism. It was the logical outcome of our attempt to unite in one government the form of a confederation and the principle of a nation. If sovereign States were to be kept within the limits which the Constitution set, it must be by something in the nature of a sovereign power that was even greater than they. The people of the United States are greater than any or all of the United States, but they cannot meet together, and none to represent them can meet together, save in the extraordinary and yet unknown event of a second national constitutional convention. They must therefore speak by the chief magistrate of the Republic; and so has come his transcendent power.

I have compared that power with the authority exercised in his dominions by the Czar of Russia. It has become a political aphorism that Russia is governed by despotism, tempered by assassination. Enhance human power to a certain point, and it becomes to some men intolerable. As we look back on the dagger of Booth, and the *sic semper tyrannis* with which he struck home his blow; at the shot of a disappointed office-seeker that cost the life of President Garfield; we cannot but feel that there are fanatics in America, also, who proceed by the methods of fanatics, and are actuated by the blind impulse of destruction in the presence of political absolutism.

But such men are few. There is despotism in American government; but all who look at it with open eyes and honest hearts know that it is despotism in reserve and despotism in division. Russia would center absolute power once and forever, in a single man. We part it between three departments of government, and however great the share of the executive may be, it is still kept within limits, and held, at most, only for

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<sup>11</sup> 2 Woolsey's "Political Science," 258.

eight years. I say for eight, because American tradition has made a third term impossible.

Our ultimate despot is the people of the United States; but they are the knights in armor that from generation to generation may slumber in the enchanted chambers of the eternal hills. They lay down to rest when a declaration of their rights had been added to the Constitution of the United States by its first ten amendments in the third year of Washington's administration. They rose to action for a moment, when, three years later, they found that their ministers of justice had so far misunderstood their meaning as to hold a sovereign State subject to the federal jurisdiction, at the suit of a private individual. Again, at the beginning of this century, they awoke, when party machinery had so far controlled personal patriotism, that Aaron Burr had almost been seated in the place which they designed for Thomas Jefferson.

A longer period of inaction followed, till the time came to proclaim by law what had been before only asserted by the sword, that slavery had become incompatible with free institutions. But the long war that made freedom national, had done much more. It had struck at States. It had conquered States. It had borne down with its strong hand barrier after barrier set by former generations to guard that vast and indefinable domain of rights "reserved to the States respectively, or to the people." It had brought into existence a new class of persons; a great class; utterly unfitted to their new position; surrounded by those who had been their masters, distant from those who had been their liberators.

Two great things remained to be accomplished. These millions of slaves, new born into freedom, must be protected in it, or given some means of self-protection; and these new relations of the States to the United States, of the old States to the new nation, must be more definitely marked and secured.

Again the knights in armor stirred in the enchanted chamber. The fourteenth amendment succeeded the thirteenth; the fifteenth soon followed, and the chapter of the civil war was closed.

But the freedom of the slave was the least of its political consequences. These three amendments of the Constitution readjusted and reset our whole system of fundamental law.

Down to 1868 each State had said for herself, My people shall be free from arbitrary arrests; their liberty and property shall be secure; their rights equal; the law impartially administered;

the stranger within my gates protected from wrong, as fully as my own sons. Now came back for a brief moment to the scene of action the people of the United States, to say, by the fourteenth amendment, that thenceforth every man should have their guaranty that the State would not recede from these obligations, but they should forever and forever be the foundation stones of American institutions.

Was this great change a welcome one to every State? You well know that it was not. Only absolute power, the absolute power of a three-fourths vote under a written Constitution—the absolute power of a Congress with the right in each of its houses to determine on the qualifications of its own members and the admission of members from any recalcitrant State—with the right to pack the jury even, by admitting to Statehood a row of mining camps on barren mountains, and giving to Nevada an equal vote with Virginia or Massachusetts—this is what forced the fourteenth if not the thirteenth amendment into organic law.

But there it is. It was a slight matter that it hastened the day of negro suffrage; and paved the way for the fifteenth amendment, passed two years later. Whenever and wherever the American negro has education enough to enable him to cast an intelligent vote, he will cast that vote, and he ought to cast it. And whenever and wherever he has not such education, he ought not to vote, and—in the long run—he will not vote. Mississippi and South Carolina have put themselves upon solid ground in saying that education must be a condition of suffrage. It is no new doctrine. In the North there is more than one State in which such has been the law for nearly half a century.

The great change wrought by the fourteenth amendment has been to concede and perpetuate to the United States vast and far-reaching national powers; to unify and centralize their government, for good or ill.

It has been said that the ideals of the Teutonic race have been in perpetual vibration from one period to another, as the pendulum of time swung to and fro across the ages, between two social forces—Individualism and Collectivism; between the cry of each man for himself, *sauve qui peut*, and the broader note of each for all.

If absolute power has risen up in the United States, and for the United States, during this century, to a height our fathers never contemplated, it is because we have departed from our Anglo-Saxon inheritance of Individualism; because the people demand more of their government, and have given it more.

When Coleridge declared that

" We receive but what we give,  
And in our life alone does nature live,"

he spoke what is, above all things, true of free institutions. For each of them, the individual citizen has parted with something. They are the great result of a common contribution; and whatever they give back we who receive have paid for, are paying for, whether we recognize it or not.

It was Collectivism that wrote the fourteenth amendment; Collectivism that ratified it; Collectivism that enforces it. Does it protect individual rights, as in no land under the broad heaven they were ever, in any age, protected before? Yes; but only by the sacrifice of other rights of Individualism; only by extension of the sovereignty of the Union at the cost of the sovereignty of the State; only by giving to the courts new authority to control legislatures, and Congress new power to control the citizen; only by giving to the President new laws to execute, of such a kind as put him forward into fields before unoccupied.

In the impeachment trial of Andrew Johnson, one of the managers of the prosecution described the President as nothing but "the constable of Congress." Had that impeachment been successful, the contemptuous taunt might have seemed simple truth. It was not successful, because all honest men, not blinded by party passion, felt that the President held great constitutional functions, which made him, in his sphere, little short of the dictator of the Republic.

I am glad that we have so great an officer. The foe that threatens American institutions to-day is not absolutism, but anarchy; not the tyranny of a man, but a tyranny of the mob. To meet it we need the strong hand of power. If we were not a nation before the civil war, we have been since. A nation must have a head. I have no fear that the President of the United States, absolute as he is, within his sphere, will ever act the part of Cæsar. The foundations of American liberty are laid too deep. The checks of the Constitution, backed by the sentiment of a free and intelligent people, are ample for any strain.

Proudly and safely rides the ship of State into the opening harbor of the twentieth century; prouder and safer because one hand and one hand only, is on the wheel.

*Simeon E. Baldwin.*

## THE REMEDY FOR LYNCH LAW.

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The great increase of homicides by lynching in the United States within the past few years has excited grave apprehension in all who realize how important to society is the due and regular administration of justice in criminal cases, and various remedies have been from time to time suggested. Perhaps one reason why none of these seem so far to have met with much success in arresting the evil is because of a failure on the part of those who suggest them to properly appreciate the grounds upon which these lynchings are sought to be justified by the more intelligent and better classes of those people who either condone, approve of, or actually participate in them. That there must be some excuses affording at least an apparent justification for them is evident from the fact that they have in almost every case the moral support of a large part and sometimes that of a majority of the communities in which they occur. As illustrating this state of affairs we read in a late newspaper that at the meeting of the Georgia State Agricultural Society at Tybee Island on August 10th, the wife of ex-Congressman Wm. H. Felton of Cartersville, who had been a member of the Board of Lady Managers of the Columbia Exposition, delivered an address upon "The Woman on the Farm," in which she used the following language:

"If it needs lynching to protect woman's dearest possession from human beasts, then I say lynch a thousand times a week if necessary. The poor girl would choose death in preference to such ignominy, and I say a quick rope to assaulters! The crying need of women on the farm is security.

"Strong, able-bodied men have told me that they have quit farming because their women folks were scared to death if left on the place."

And to show that the feeling thus expressed is not peculiar to any one section of the country we also read that within a few weeks before the delivery of this speech by Mrs. Felton in Georgia, a mob of "the better class of citizens" at Urbana, in the State of Ohio, took a negro from the jail and lynched him for "the usual crime."

It is obvious that the only plea in any way justifying private citizens in thus taking the law into their own hands for the punishment of offenders must be that of self-defense, in which term

I include the protection of one's family and property. Such protection can be furnished in general only by the reasonably prompt and certain punishment of those who violate the rights of person or property; and when the ordinary machinery for the administration of justice for any reason proves utterly inadequate to secure such punishment, it may sometimes be found absolutely necessary to resort to extraordinary methods of procedure for that purpose. But in the punishment of the particular crime, to which must be mainly attributable that epidemic of lynching that now prevails throughout the country, courts and juries generally show considerable promptitude in convicting the accused whenever there is sufficient evidence to sustain the charge, and rarely clear the guilty upon fine-drawn legal technicalities. The main ground for complaint cannot be found in any want of either ability or inclination on the part of the constituted authorities to mete out due punishment to offenders of this class, but is to be sought rather in the methods of procedure by which alone the power of the law can be invoked against them.

Under the system of criminal procedure which prevails generally throughout the United States convictions can only be obtained upon the testimony of witnesses who are present in court. Ordinarily the witnesses must first appear before the committing magistrate, then before the grand jury and finally before the trial court. Before the committing magistrate and in court they testify in the presence of the accused and subject to cross-examination by him or his counsel. In cases of rape and attempted rape it is rarely possible to obtain sufficient evidence to justify a committal or indictment, much less a conviction, without the testimony of the woman who has been assaulted. Now when we consider how profoundly humiliated any woman must feel who has been the victim of an outrage of this character, and how, under existing social conditions, this humiliation must be greatly intensified by the wrong having been committed by a negro, is it possible to deny that requiring her to tell the story of her shame publicly three times, the last time in a crowded court room, where, subjected to a long and hostile cross-examination, she may be compelled to recapitulate all the details of the crime with the minutest particularity, would be nothing less than inflicting upon her a degree of mental torture scarcely inferior to that attending the outrage itself? As a matter of fact, I believe it to be a natural desire to shield the victim of outrageous assaults from the ordeal of thus testifying about them in court which more than anything else causes lynch law

to be resorted to. Given a case where a crime of this sort has been committed and where a man has been caught whom the woman identifies as her assailant, unless she be a person of notoriously abandoned character, it will be very hard to convince the average citizen living in her neighborhood, that it is not a far less evil to anticipate the sentence of the law by promptly lynching the accused, than it would be to make a public spectacle of her in the court house in order to procure his conviction and punishment according to law. This popular feeling would of course be very much stronger if the man charged with the crime should be a negro. How far this prevailing sentiment may be theoretically right or wrong, it is now useless to inquire. The daily papers show us that as a fact such a feeling does now widely exist throughout the country, and it is therefore "a condition, not a theory, which confronts us."

To correct the evil we must recognize the existing condition, and adapt our remedies to it. Until some method can be found to avoid the necessity of requiring the woman to appear upon the witness stand in open court in order to convict her assailant of rape, there will unquestionably always continue to prevail a strong feeling that a resort to lynch law for that purpose is justifiable under the circumstances. It is not for a moment supposed that the removal of this cause of complaint will *of itself* suffice to at once put an end to lynching, but it is submitted that in view of recent experiences there can be but little hope of preventing lynching in cases of rape, especially when committed by negroes, so long as the women must be brought into court to testify; and that wherever lynching is tolerated for one cause the tendency will be always very great to extend its operations and apply it for other causes. In proof of this last assertion I need only refer to the lynching, since the foregoing sentence was written, of five men in Ripley County, Indiana, for stealing.

Let us consider, therefore, how far it may be practicable to do away by legislation with the present necessity for requiring a woman who has been the victim of an outrage to appear upon the witness stand in open court. The existing law is concisely stated by Judge Cooley in his work on "Constitutional Limitations," page 318, as follows:

"The testimony for the people in criminal cases can only, as a general rule, be given by witnesses who are present in court. The defendant is entitled to be confronted with the witnesses against him, and if any of them be absent from the Commonwealth, so that their attendance cannot be com-

pelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements against the prisoner can be used for his conviction. The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances; but they are far from numerous. If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party. So, also, if a person is on trial for homicide the declarations of the party whom he is charged with having killed, if made under the solemnity of a conviction that he was at the point of death, and relating to matters of fact concerning the homicide which passed under his own observation may be given in evidence against the accused.

In making any modification of the law of evidence as thus stated it is of course imperative that due care be taken not to infringe upon the rights of the accused which are secured by the Constitution of the United States, and also by those of most if not all of the several States to a trial by jury and "to be confronted with the witnesses against him." The latter of these is not only a constitutional but a natural right which has been long recognized wherever an inherent sense of justice and fairness has prevailed, for when the Jews applied at Jerusalem to Festus, their Roman Governor, to give judgment against the Apostle Paul, then a prisoner at Cæsarea, he answered, "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."

While, however, the accused has an undoubted right to be confronted with the witnesses against him and to cross-examine them or have them cross-examined by his counsel in his presence, there is no ground either constitutional or natural why this right should in all cases be exercised by him in open court, and moreover, there is abundant authority for the proposition that these rights like most others, may be voluntarily waived by a failure on his part to avail himself of them with reasonable promptitude when a fair opportunity had been offered him to do so.

The following tentative draft of a statute is submitted as illustrating the general character of the legislation which is in the opinion of the writer necessary as a prerequisite to any effective dealing with the question of lynch law in the United States at the present time.



## DRAFT OF AN ACT TO AMEND CRIMINAL PROCEDURE IN CERTAIN CASES.

1. Whenever the State's Attorney shall have good reason to believe that the crime of rape has been committed, or attempted, or that any outrageous or indecent assault has been made upon any woman or woman-child in his county, he shall at once give notice thereof to a judge of the court having criminal jurisdiction of said offense, who shall, as soon thereafter as conveniently may be, cause the person so assaulted to come before him, and shall forthwith examine her upon oath privately concerning the said matter. No person shall be present at such examination besides the said judge and the witness, excepting the clerk or stenographer appointed to take down her testimony, and one other person to be selected by the witness. The testimony shall be reduced to writing, signed by the deponent and attested by the judge before whom it is taken, and shall be by him delivered to the State's Attorney, who shall be at liberty to use it as competent testimony in any proceeding before any committing magistrate in which the matters therein testified to would be admissible evidence if testified to by the said deponent orally.

2. The said deposition taken as provided in the preceding section shall be competent evidence before any grand jury to the same extent as would the oral testimony of the deponent to the matters therein contained, unless the judge before whom the same was taken shall at the time of certifying thereto have endorsed upon it a memorandum to the effect that in his opinion the purposes of justice require that said deponent should testify orally before the Grand Jury.

3. Whenever any person shall be indicted for any offense testified to in any deposition taken under the preceding sections, the State's Attorney for the county shall forthwith furnish him with a copy of such deposition, and shall cause him as soon thereafter as conveniently may be to be brought before a judge of the court having criminal jurisdiction of the case and then and there confronted with the said deponent, whom the State's Attorney shall thereupon interrogate under oath touching her ability to identify the prisoner as the person whom she alleges to have assaulted her, and also as to such other matters as the judge shall deem relevant to the case. The said deponent may then be cross-examined by the prisoner or his counsel to the same extent as would be admissible in court if she there testified orally to all the matters embraced in the original deposition and her subsequent examination by the State's Attorney, and she may be afterwards reexamined by the State's Attorney. The only persons allowed to be present at such examination, beside those allowed at the taking of the original deposition, shall be the State's Attorney, the accused and one counsel representing him. The whole testimony of the said deponent given at said subsequent examination in the presence of the accused shall be committed to writing, signed by the deponent and certified to by the said judge and annexed to her original deposition, and the said deposition and subsequent deposition so taken and certified, may be read in evidence to the jury at the trial of the case with the same effect as if the deponent had testified orally in court to all the matters therein contained. *Provided*, That the trial judge or judges may, in his or their discretion, at any time before the jury is sworn, if convinced that justice to the accused demands it, require the said deponent to testify orally in court by giving a reasonable notice thereof to the State's Attorney.

It is believed that the foregoing draft of an act provides for taking the testimony of women upon whom outrageous assaults have been made with all the privacy and delicacy compatible with a due regard for the rights of the accused. The preliminary examination by the judge, presumably a man of a fair degree of education and refinement, as well as of considerable experience in sifting evidence, with no one present excepting his amanuensis and such friend or relative of the deponent as she may desire to be with her in order to give her confidence and moral support in the distressing position in which she finds herself, made as soon as possible after the occurrence, would be as effective and at the same time as delicate a method of getting at the exact truth as could be well desired. The subsequent confronting her with the accused and her cross-examination by his counsel with the same privacy and before the same judge, whose duty it would be to see that this privilege of cross-examination should be restricted within proper limits and exercised with decency and propriety, would reduce to a minimum the painful embarrassments which must inevitably attend the situation. It will be noticed that, while the proposed law provides that the depositions taken under it may be read in evidence to the jury at the trial, it does not require them to be read aloud in the court room. The judge might well allow the jury to withdraw for a few minutes to their room while one of them could there read the deposition to the others, after which they could return to hear the other evidence in the case. The counsel for the accused having a copy of the deposition could in his arguments refer to so much of it as he might find necessary without going into all the details. It would, of course, be a grave breach of propriety for the State's Attorney to let the reporters see the paper, and would be greatly for the interest of the prisoner to prevent its publication, as nothing would be more likely to excite public indignation against him to such an extent as might lead to his being lynched. The provisions clothing the judge with discretionary power to require the woman to testify orally before the grand jury and in open court at the trial are inserted to prevent any advantage being taken of the act by those abandoned characters who sometimes trump up unfounded charges of rape against wealthy or prominent citizens for the purpose of levying blackmail.

*Wm. Reynolds.*

BALTIMORE, September, 1897.

## THE INFLUENCE OF THE EIGHTEENTH NOVEL OF JUSTINIAN.

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Justinian, conqueror and legislator, ruled with dazzling brilliancy over the Roman Empire of the East from 527 to 565 A.D. His generals brought to a successful issue the conquest of Africa and Italy. His jurists gave to legal science that body of law known as the *Corpus Juris Civilis*. His fame as a legislator has easily survived that of conqueror. Truly Bulwer said, "The Pen is mightier than the Sword."

The Novels of Justinian, and later Emperors, mark the completion of the *Corpus Juris*. These *constitutiones* were enacted (535 to 565 A.D.) to add to and perfect the existing body of Roman law. The Emperor had an ideal excellence, so necessary in law, as the *Constitutio Cordi nobis est* attests: "It lies at our heart, conscript fathers, ever to regulate the cares of our mind most zealously, so that nothing begun by us remains imperfect."

The Eighteenth Novel (536 A.D.) introduced the all-important principle of cognation into the Roman system of law; which principle produced a transformation perhaps never before or since equalled in the law of property rights. Cognation is the opening wedge in the decline of the ancient *patria potestas*. The present Novel limits also the absolute disposition of property by testaments and provides a statutory portion for children legitimate and natural. The inception of individual legal equality is first met with in this *Constitutio*. It covers many points of procedure and among these, one in the subject of special pleadings, providing that a possessor defendant, who alleges title in answer to plaintiff's demand, and has legal title as mortgagee not specifically alleged, loses such title and forfeits possession to the claimant. The suggestion is made of the division of the paternal inheritance between children before death lest the succession be the cause of a "thousand quarrels to them."

## I.

## THE PRINCIPLE OF COGNATION.

The principle of cognation was known to other legal systems before incorporated in the Roman law. Religion, among the Hindus, called to the succession on failure of legitimate heirs, the son of an "appointed daughter." Sir Henry Maine, in "Early Law and Custom," page 91, says: "He is, in Roman phrase, a 'cognate,' a kinsman through women only, who according to the usage prevailing among all the more powerful races of mankind, either from the first or at a certain stage of their development, can not continue the family." "Some customs near akin to the Hindu usage of 'appointing' a daughter appear to have been very widely diffused over the ancient world, and traces of them are found far down in history. The daughter here becomes neither the true successor of her father, \* \* \* but a channel through which his blood passes to a male child, capable, according to the oldest nations, of sacrificing to him; and, according to the newer ideas, of taking his property and preserving the continuity of the household. Among the Athenians a father, fearing sonlessness, might have a son raised up to him by a daughter."

Legislation, on the other hand, introduced cognation to the Roman system of law in the reign of Justinian. Whether religion anciently in Rome, as in Greece and India, developed cognation, and at the time of the introduction of the law of the Twelve Tables it had gone into disuse, may be questioned. In the first third of the sixth century, A.D., agnation determined the line of descent.

By the law of the Twelve Tables, intestate property passed first to *sui heredes*, then to the nearest agnate, and finally to the gentiles. The *sui heredes* "were the agnatic descendants of the deceased who were subject to his immediate power. They belong to the household of the deceased by virtue of the *patria potestas*" (Sohm's "Institutes of Roman Law," p. 445). This law of succession by the Twelve Tables was unjust and inequitable in that it deprived emancipated sons and descendants of women entirely from the inheritance of the ancestor, preferring the agnates and gentiles.

Following and supplementing the law of the Twelve Tables, the prætorian edict gave the patrimony of the intestate by *honorum possessio*: First, to the children, emancipated and unemancipated; second, to *sui heredes* not including emanci-

pated children, and in default of *sui* to the nearest agnate; third, to cognates; and fourth, to the husband and wife (Sohm's "Institutes," pp. 439-42). The prætor gave relief to the emancipated children by including them with those under *potestas*. Justinian made no provision for the descendants of women until the legislation embraced in

The Eighteenth Novel increased the intestacy share of children in case of four children or less to one-third, and in excess of four children to one-half of the inheritance. It amended the Early Civil law in this that all grandsons and great-grandsons by a son to a grandfather should be entitled to their father's share, although they were not, as such grandsons and great-grandsons, if emancipated, entitled to such portion by the Early Civil law.

Further, it enacted that grandsons and daughters and great-grandsons and daughters to a grandfather by a daughter and to a paternal and maternal grandmother should be heirs to such grandfather, paternal and maternal grandmother. "We ordain one succession in regard to all grandsons or great-grandsons, not permitting a woman to receive less than a man in such cases" (*Post* Novel 18, chapter IV). This *Constitutio* made all descendants, male and female, heirs of the grandparents, male and female.

The Eighteenth Novel made grandsons and great-grandsons heirs of the grandparents; the law of the Twelve Tables, however, still excluded the inheritance of sons in power from their children and such inheritance passed to the *paterfamilias*. The 118th Novel expressly made children of sons in power the heirs of such son, and upon the latter's death the children and not their grandparents succeeded to the succession of such son.

Chapter IV, 118th Novel, reads: "Moreover we desire [that] no difference may exist in any succession or inheritance between those persons, males and females, who are called to the inheritance, whom we decree to be called to the inheritance in common, whether linked to the deceased by a male or female; but in all successions, we decree the difference of agnates and cognates to cease, either on account of the female person, or because of emancipation, or in any mode whatever treated of in former laws, and without any distinction of this kind we decree all to come to the intestate succession of cognates according to the decree of his cognation."

With the 118th *Constitutio* the Justinian law recognized in its full scope the principle of cognation which had been of a slow

growth in Roman law. The prætor first introduced cognation allowing emancipated children a portion of the inheritance; then the *senatus consulta*: Tertullianum gave to a mother the right to succeed her intestate children; the Orphitianum gave the first right of children to the succession of their intestate mother; Valentinian II. and Theodosius "gave children a right of intestate succession as against maternal ascendants in preference to more remote agnates." Anastasius gave emancipated brothers and sisters the right to take with agnatic brothers and sisters (Sohm's "Institutes," p. 442). The 18th Novel made cognates heirs of grandparents and the 118th Novel made cognates the heirs of their father.

"Cognition is the relationship arising through common descent from the same pair of married persons, whether the descent be traced through males or females" (Maine's "Ancient Law," p. 141).

Thus in Roman law, the principle of agnation became merged in that of cognation. The latter has been bequeathed to and forms the rules of descent and ascent in the following countries:

The laws of Holland recognize two successions for intestate property: feudal and allodial. "The succession of relatives among us is either according to the rule of the law of the place, or by choice of the public law." By the *lex loci*: "In the first degree of the ascending line are father and mother; in the first degree of the descending line are sons and daughters. In the second degree of ascending relatives are two grandfathers and two grandmothers; that is, on the father's and mother's side. \* \* In the second degree of descending relatives are grandchildren: that is, sons' sons, sons' daughters, daughters' sons, daughters' daughters" (Grotius' "Dutch Jurisprudence," pp. 174-7). The *lex publica* provides: "First, then, as long as descending relatives are found they are alone entitled to the inheritance, to the exclusion of all other relatives." On failure of the latter, "the father and the mother of the deceased, in case both are alive, inherit the whole of their children's property" (*Ibid.* 187 *et seq.*).

The French Civil Code, s. 745, provides: "Children or their descendants succeed to their father and mother, grandfather, grandmother, or other ascendants, without distinction of sex or primogeniture, and although they be of different marriages."

In regard to successions of ascendants, s. 746, recites: "If

the deceased has left neither posterity, nor brother, sister, nor descendants of them, the succession is divided in halves between the ascendants of the paternal line and the ascendants of the maternal line."

The *Code Civil Italien*. s. 736, is: "Legitimate children and their descendants succeed to the father, to the mother and every other ascendant, without distinction of sex and although they are of different marriages."

S. 738: "If one dies leaving neither posterity, \* \* \* the father and mother succeed by equal portions."

S. 739: "If one dies \* \* \* ascendants of the paternal line succeed for one-half, and for the other half ascendants of the maternal line, without regard to the origin of the estate."

Johnston's translation of the "Institutes of the Law of Spain," page 119, interpretes: "From all that has been said, we draw one general conclusion, that all the property of the parents is the lawful portion or right (*la legitime*) of the children, with the exception of a fifth; and the property of the child, who dies without issue or descendants, belongs of right (*son legitima*) to the parents.

"In successions *ab intestato*, the descendants hold the first place, and among them children without regard to sex, inherit the property of the deceased. \* \* \* In default of descendants, ascendants succeed or inherit \* \* \* without distinction of the paternal or maternal side."

The Civil Code of Louisiana, art. 902, declares: "Legitimate children or their descendants inherit from their father and mother, grandfathers or other ascendants, without distinction of sex or primogeniture, and though they may be born from different marriages."

Art. 903, proceeds: "If any one dies leaving no descendants, but a father and mother, \* \* \* the succession is divided into two equal portions, one of which goes to the father and mother, who divide it equally between them \* \* \*."

Art. 906, continues: "If there are ascendants in the paternal and maternal lines in the same degree the estate is divided into two equal shares, one of which goes to the ascendants on the paternal, and the other to ascendants on the maternal side, whether the number of ascendants on each side be equal or not."

The Austrian Civil Code (*de Winiwarter*) reads: "Legitimate children may be of the male or female sex" (s. 732).

Sec. 738: "The inheritance is then divided in two equal parts. The one half belongs to the parents of the father and the other to the parents of the mother."

In England before the Conquest, real and personal property was divided equally between children and their descendants; since that period the feudal law has regulated landed property; and personalty, after payment of lawful debts, is divided *pro rata* between the wife and children, or if the wife was deceased, between the children.

"Before the Conquest \* \* \* and in more ancient times still, all the children, both male and female, inherited alike; and the estate, whether real or personal, descended to all equally (1 Salk. 251; Hale's H. C. L. 220; Dalrymp. Feud. 201-2; Burn's "Ecclesiastical Law," p 380).

"Sec. 5. All ordinaries shall distribute \* \* \* the residue by equal portions to and among the children of such persons dying intestate and such persons as legally represent such children" (*Ibid.*, p. 340).

In Scotland the Civil Law of Rome was generally adopted, and hence what has been said (*supra*) applies with more force to North Britain. "There is no doubt that the extent to which Roman Civil Law has been incorporated with the law of Scotland has given it a greater resemblance to the codes of the majority of European states than it has to the Common Law of England" (Burton's "Law of Scotland," p. 105).

The revised statutes of several of the United States are subjoined:

Connecticut's, Sec. 630. The distribution of intestate real estate "shall be distributed in equal portions \* \* \* among the children and the legal representatives of any of them." Sec. 632, "If there be no children \* \* \* then to the parent or parents." The rule of the Civil Law is adopted in regard to ascertaining the degree of next of kin in Connecticut, Illinois and Massachusetts.

Illinois', chap. 39, Sec. 1: "That estates, both real and personal, of residents and non-resident proprietors in this State dying intestate \* \* \* shall descend and be distributed: \* \* \* First, to his or her children and their descendants." On failure of descendants "then to parents."

Massachusetts', Chap. 125, Sec. 1, real estate descends: "First, in equal shares to his children, \* \* \* then to all his



other lineal descendants. Second, if he leaves no issue, then in equal shares to his father and mother."

Walker in his "American Law," page 400, states: "First of all (by the statute law of Ohio) property descends to children and their issue, *per capita*, where all are in the same degree, and *per stirpes*, where they are not. This rule operates wherever there are children or children's issue to the exclusion of all collateral relatives.

"The rules of descent (*Ibid.*, p. 396) vary considerably in the different States, but all the States agree in departing from the English law so far as to promote equality among the heirs. For example, the two great characteristics of the English canons of descent, namely, primogeniture, or a preference of the eldest son over all the other children, and a preference of males over females, are probably found nowhere in the United States."

Our first conclusion, then, is that the principle of cognation in descending and ascending lines in the succession laws of the countries of Holland, France, Italy, Spain, Louisiana, Austria, England and Scotland before the Conquest and thereafter in distribution of personalty, and most generally in the States of the United States, had its source in the Eighteenth Novel of Justinian.

#### INDIVIDUAL OWNERSHIP AND CONTRACT.

Judge Holmes has said: "I shall use the history of our law so far as it is necessary to explain a conception or to interpret a rule. In doing so there are two errors to be avoided. \* \* \* One is that of supposing because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times. The other mistake is the opposite one of asking too much of history. We start with man full grown. It may be assumed that the earliest barbarian whose practices are to be considered, had a good many of the same feelings and passions as ourselves" ("The Common Law," 2).

Religion among early societies has established ownership. Among the Jews, God gave the land to the patriarchs, thus delegating the ownership of land to men. Among the Greeks and Romans, the domestic gods were their first religion and gave them the idea of property. The ancient religious beliefs gave rise to the conception of private family property ("*La Cité Antique*," 62-9).

The family (gens) has been from the first the only form of society. Comparing the domestic institutions, M. Coulange finds the same religious principles running through all the races descending from the Aryan branch of mankind in India, Greece and Rome, and draws the inference then that the family organization preceded the separation of the Aryan group. The early right of property was in the family which finally gave way to individual ownership. Each member of the family is an integral part of the family and free service is unknown" (*Ibid.*, 125-6-7).

M. Tarde in his critical work, "*Les Transformations du Droit*," 12, makes the conclusions following: "In penal law, \* \* \* from family retaliation and revenge, follow pecuniary compensation and subsequently legal proceedings. In the *régime* of persons, the primitive universality of the matriarchy was followed by patriarchy, and then the slavery of women, and the change from this slavery to the slow emancipation of women. \* \* \* In civil right, the primitive universality of the village community, then of family in the *régime* of goods, before the gradual conception of private property."

"In the oldest times the family is the sole owner; individual ownership is unknown and common ownership is the only recognized form. The common ownership of the family developed in the course of time into the private ownership of the individual" (Sohm's "Institutes of Roman Law," 408).

"To a man who wished to make a will the ancient legislator replied: 'You are the owner neither of your property nor of yourself; you and your goods, all that belong to the family, that is to say to your ancestors and to posterity!'" (Tarde, *Ibid.*, 72-3).

"The Roman law, which supplies the only sure route by which the mind can travel back without a check from civilization to barbarism, shows us society organized in separate families, each ruled by the *paterfamilias*, its despotic chief" (Maine's "Early Law and Custom," 238).

The *sui heredes* "are heirs of the house, and even in their parents' lifetime are regarded as in a manner owners [of the family estate]" (Gaius' "Institutes," B. II. 157). "Whatever our children in power or our slaves receive in mancipation or acquire by delivery, whatever claim they obtain either by stipulation or on any other ground is acquired for us; for he who is in power can have nothing of his own" (*Ibid.*, II. 87).

"Under the old civil law the father's absolute power is not confined to the person of his child, but extends equally to his

property. In fact, the effect of *patria potestas* is virtually to destroy the proprietary capacity of the *filiusfamilias*. He is incapable of having any rights of property of his own. Whatever he acquires passes, by the necessary operation of the law, to the *paterfamilias*. \* \* \* It was only during the Empire that Roman law, in the course of its progressive development, broke through, one by one, the consequences flowing from the ancient law and gradually established the principle of the proprietary capacity of *filiusfamilias*" (Sohm's "Institutes," 391).

"The ancient law of Rome forbade the children under power to hold property apart from their parents, or (we should rather say) never contemplated the possibility of their claiming a separate ownership. The father was entitled to take the whole of the son's acquisitions, and to enjoy the benefit of his contracts without being entangled in any compensating liability" (Maine's "Ancient Law," 136).

"Every Roman citizen is either a *paterfamilias* or a *filiusfamilias*, according as he is free, or not free from paternal power. *Paterfamilias* is the generic name for a *homo sui juris*, whether man or woman, child or adult, married or unmarried; *filiusfamilias* is the generic name for a *homo alieni juris*, whether son or daughter, grandson or granddaughter, and so on" (Sohm's *Ibid.*, 120).

A *filiusfamilias* when a *miles* had a limited proprietary capacity in his *peculium castrense*; from the pay received in the army, ownership in him was extended to pay received in public office, called *peculium quasi castrense*. Later, ownership included property inherited by the *filiusfamilias* from his mother. And in Justinian's reign the son could own all property except *ex re patris*. The *paterfamilias* had the usufruct of the *bona adventicia* (Sohm's *Ibid.*, 391-2).

The one-ownership of the father of a family by gradual change did not include certain property in which the son came to have exclusive ownership, thus leaving the father only a usufruct therein. The one qualification for owning property, except as just stated, was that one should be a *homo sui juris*, that is, a *paterfamilias*.

The inheritances of intestates by a law of the Twelve Tables belong in the first place to their *sui heredes*, who are descendants under power, as a son or daughter, and other descendants only by a son, whether actual or adopted. The grandson becomes *suus heres* only when his father or other ascendant ceases to be in power (Gaius III. 1, 2). A son or sons and daughter or

daughters and descendants through males are called to the inheritance simultaneously (*Ibid.*, III. 7). The immediate children succeed *per capita*, the descendants of deceased children *per stirpes* (*Ibid.*, III. 8). On failure of *suus heres*, the nearest agnate succeeds (*Ibid.*, III. 9, 10, 11). If there are no agnates the gentile succeeds (*Ibid.*, III. 17). Emancipated children do not succeed (*Ibid.*, III. 18); nor if not under power (*Ibid.*, III. 20); nor cognates (*Ibid.*, III. 24). The prætor calls emancipated children to the inheritance with the unemancipated (*Ibid.*, 25).

The Eighteenth Novel made all grandchildren, male and female, heirs of the grandparents, male and female, in the event of intestacy. When the parent of the grandchild or grandchildren was deceased the child or children received *per stirpes* the share of their parent, male or female. "We ordain one succession in regard to grandsons or great-grandsons, not permitting a man to receive less than a woman in such case" (18th Novel, chapter IV.).

We see the principle of agnation merged in that of cognation in intestate succession. The result is the diverging of ownership from the immediate lines—the sons and daughters—to the children, male and female, of a deceased daughter; and the property of a deceased paternal or maternal grandmother, instead of going to the nearest agnate with grandchildren living, descends to all such grandchildren. Such grandchildren take their deceased parents' share. If these grandchildren were in power the *paterfamilias* received the usufruct, but the grandchildren, male and female, became *sui juris* as to such property. The power of the *paterfamilias* over private property is thus further curtailed, and we witness the creation of new individual ownership produced by the principle of cognation.

The 118th Novel, chapter I., decreed: "Accordingly, if any one of the descendants survived him [one who has died intestate] of either sex or in whatever degree, whether descending from the genus male or female, and whether he is *sui juris*, or whether in power [such descendant] is preferred to all ascendants and collaterals. For although one, who is deceased, shall have been in another's power, nevertheless his children, of either sex or in whatever degree they may be, even to the parents themselves, in whose power he was, who has deceased, we decree to be preferred, to wit, in those things which are not acquired to fathers by our laws. For concerning the usufruct of these things which ought to be acquired or preserved to them, we preserve to parents our published laws concerning these

things; nevertheless in such a way if it shall have happened that any one of these descendants dies having left children, those sons or daughters or other descendants succeed in the place of their parents, whether they are found in the power of the deceased or *sui juris*, they will be about to accept such part from the inheritance of the deceased, as many as these may be, so much as their parents would have received if they had survived, which succession antiquity called *in stirpes*. For in this succession we are unwilling to prescribe degree, but we enact, with sons and daughters, grandsons to be called from a pre-deceased son or daughter, nor does it make any difference whether they are males or females, and whether they descend from the masculine or feminine sex, whether they are in power or even *sui juris*."

The Eighteenth Novel made all grandchildren the heirs of grandparents; that is to say, the principle of cognation superseded the narrower one of agnation. Cognation was, as we have seen, transferred to the One hundred and eighteenth Novel from the Eighteenth. The next step was to make all grandchildren the heirs of a deceased *filiusfamilias* under *potestas* at the time of his death. Hence the property of the son which formerly reverted to the *paterfamilias* descends to the grandchildren, converting the ownership of the *paterfamilias* into the individual ownership of the heirs, descending *per capita* to the sons and daughters and *per stirpes* to their descendants by representation. The estate of a deceased *filiusfamilias* under power passed then upon intestacy to his descendants just as the estate of the *paterfamilias* deceased devolved.

With the enactment of the One hundred and eighteenth Novel the *patria potestas* lost its supremacy in the law of private property by giving the deceased *filiusfamilias* heirs; and the principle of intestate cognatic succession gave full birth to individual ownership in each of such heirs.

"The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the family, as the unit of which civil laws take account" (Maine's "Ancient Law," 163).

The exclusive ownership in the private property of the family extended from the time of the Twelve Tables (500 B.C.) to the end of the first third of the sixth century A.D., over one thousand years except in certain property acquired by the *filius-*

*familias* in which the head of a family had a usufruct. Then by intestate cognatic succession introduced in the Eighteenth and later incorporated in the One hundred and eighteenth Novel we find family ownership has passed into that of the individual.

We further conclude that the principle of intestate cognatic succession introduced in the Eighteenth Novel produced a profound evolution in the rights of private property, expanding the family ownership in the *paterfamilias* to the extent of creating a separate ownership in each member of the family.

#### INDIVIDUAL CONTRACT.

"The word status may be usefully employed to construct a formula expressing the progress thus indicated (the gradual dissolution of family dependency and the growth of individual obligation in its place), which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of status taken notice of in the law of persons were derived from, and to some extent are still colored by the powers and privileges anciently residing in the family. If, then, we employ status, agreeably with the usage of the best writers, to signify those personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from status to contract" (Maine's "Ancient Law," 164-5).

"It will now be seen what is meant by the saying that the progress of society is from status to contract. What I think is meant is, that the rights and duties which are attached to individuals as members of a class are coming gradually more and more under the control of those upon whose assent they come into existence; and that the remedy for any breach of them is more frequently now than formerly the ordinary remedy for breaches of contract. This is obviously the case with the rights and duties which attach to master and servant; and it is even beginning to show itself very strongly in the relations of husband and wife" (Markby's "Elements of Law," 101).

In passing from the subject of ownership to that of contract, let us picture a vast plain and rising from its surface in equal proportions many mountains sporadic. We will, for convenience, call each eminence a *paterfamilias*. The relations between the collective group of *patresfamilias* are regulated by the respective heads in family rights, and breaches of duties are adjudicated in the public court. That is to say, all exogamous or public relations are personal to the *patresfamilias* and if con-

tracted by their children or slaves in power accrue to the benefit of such *patres*. Under these social conditions the rights of ownership and contract are limited to the despotic chiefs.

To consider each *mons* apart and to itself in its endogamous or private relations, we find the *paterfamilias* the high-priest, sole judge and proprietor. We have seen *supra* that the ownership of a son and head of a family, when deceased intestate, passed to their heirs and created individual ownership in each heir.

In case the *paterfamilias* dies intestate the *mons* or eminence in its collective ownership is divided between the heirs and becomes *monticuli* or little eminences. A levelling process is in action creating heads and doing away with sons of families. Each *monticulus* becomes a separate owner. Instead of the *montes* contracting with one another the *monticuli* bargain with the *monticuli* and the remaining *montes*. The process ends when collective or family ownership becomes individual property exclusively.

The public encroaches upon the domestic *forum* and as the levelling process goes on the business of the public court from cases between *montes*, assumes jurisdiction between *mons* and *monticulus*, and *monticulus* and *monticulus*. The private or family court thus in time disappears.

May we assume from the foregoing that family rights and duties, just as ownership, become by this process individual rights and duties? If so, our third conclusion is that intestate cognatic succession of the Eighteenth Novel converted family rights and duties into individual rights and duties.

#### CONCEPTION OF INDIVIDUAL OWNERSHIP.

The principles and laws of the ancients differed from ours. The conception of private property has never been conceived by some races of men, with others it is a slow growth. The conception and appropriation of real property as belonging to an individual was a complex problem; personal property being first recognized as such among the Tartars for instance. With the early Germans land was given out for a year and exchanged at the end of that time, an ownership rather of the crops than the land. From the earliest times the Greeks and Romans recognized private family property. While the Germans did not own the land they did the yearly crops; with the Greeks they owned the land but the crops were held in common. The family and private ownership have from the beginning been deeply rooted and grown with the domestic religion (*La Cité Antique*, chapter VI.).

Aside from the Romance peoples who have closely, almost exactly, followed the Roman law in their respective systems of law, is it not a fair conclusion that our conception of private individual property and individual rights and duties had its source in the Roman Law, and its progress was accelerated by the principle of intestate cognatic succession introduced by the Eighteenth Novel?

#### INDIVIDUAL LEGAL EQUALITY.

"Of the whole family it was only the *paterfamilias* who was able to appear before the tribunal of the city. Public justice exists only for him. He was also responsible for the *delicts* committed by the members of his own family.

"If justice, for the son and wife, was not in the city, it was in the house. Their judge was the *paterfamilias*, sitting as a tribunal, by reason of his martial and paternal authority, in the name of the family and under the eyes of the domestic gods" (Coulange's "*La Cité Antique*," p. 102).

From the foregoing it will be seen that those persons not *sui juris* had no standing in the public court and had recourse only to the family court. In the preceding pages we have shown the gradual merging of the family into the public court. To the same end, we subjoin the following, respecting the parties litigant passing from the private family tribunal to the public *forum*.

The Roman family law may be considered in three relations, the law of marriage; the law of guardianship; and the law of *patria potestas*. The latter is the relation between the *paterfamilias*, and his descendants. We have *supra* endeavored to show that the principle of cognation levelled the power of the *paterfamilias* in ownership into separate individual ownership upon intestacy, creating individual rights of ownership and contract in immediate children male and female *per capita* and the descendants of such deceased children *per stirpes*.

Excepting the law of marriage, the relation in property between husband and wife; and the law of guardianship, the relation in property rights between guardian and ward, we find by the principle of intestate cognatic succession in ownership all individuals born free become *sui juris*, that is, all free persons, male and female, not minors, married women, or those under legal disability.

The conclusion follows that being *sui juris* in ownership and contract, each individual, except as stated, may bring or defend an action in respect of the rights and duties of such ownership and contract.

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(To be continued).



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MR. REYNOLD's article on "The Remedy for Lynch Law" is most timely, in view of the pressing need of some check on the greatly increasing evil of capital punishment by mob violence. It is a matter of statistics that the number of lynchings up to and including August is greater than the number for the corresponding period of last year, and the abuse has become so common in the South that the bar associations of several Southern States have taken action to secure reforms in methods of procedure that will lessen the frequency with which the mob usurps the functions of the law. The Georgia bar urges the adoption of laws embodying the following principles, as likely to remove some of the provocation to violence: That criminal pleadings should be amendable, that the State and the defendant should be upon an equality in the challenges of jurors, and that prisoners who desire to make any statements on their own behalf should do so under oath and subject to cross-examination. Mr. Reynolds' remedy regards the cause of lynching in a different light from the legislation suggested by the Georgia bar, and it seems that what, in his opinion, is the justification of lynch law has been often overlooked, although, no doubt, it is the main ground for the continuation of the practice, at least in the many cases where a woman has been the injured party. Mr. Reynolds considers the chief argument in extenuation of lynching to be that it is the only punishment available which does not subject the unfortunate victim to the additional humiliation of having to relate all the details of the crime before a crowded court room. It is this excuse that his remedy is calculated to remove, and the means proposed are both logical and practical in view of the end desired.

Another reform that would greatly tend to lessen the evil would be legislation directed toward the more even, speedy and certain administration of the law; there would be less lynching, if communities could feel more sure of the infliction of an adequate penalty by the law.

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WHETHER, as some would have us believe, respect for law is passing, or whether law and courts of justice are still held in as high esteem as ever, no one can fail to notice that the question, how to conserve reverence for the law has become a serious one in the opinion of many. Whatever the fact, and whatever the justification for raising this question, the current sentiment of dissatisfaction is significant, and the more so as the discussion of the matter comes not only from the partisan press, but from the bar itself. One of the party platforms of the late Presidential campaign went so far as to attack the United States Supreme Court, "the bulwark of the Constitution"; the injunction proceedings in the recent strike of coal miners have evoked no little comment on the "abuse of the injunction," and the judicial subversion of the processes of law, while the theme of several addresses delivered during the Summer before meetings of various bar and other legal associations, has been that disrespect for law was becoming a serious menace to our institutions.

It is toward the law-makers rather than toward the courts that the mass of unfavorable criticism has been directed, and the spirit of disrespect may be attributed largely to over-legislation, to legislation that is not only unwise, but unnecessary. Mr. F. J. Stimson made the astounding statement, in the *Yale Review* of November, 1896, that "nearly half of the social, economic or labor legislation, passed by the State Legislatures in the past ten years has been questioned in the courts upon constitutional principles; and of the labor legislation, probably half has been annulled by them." Under such provocation it is not remarkable that the mind of the people loses much of its reverence for the law.

The failure of enactments to express intention is a common fault of legislation; our attention has been called within a few months to striking instances of this in the Acts of Congress. And not only is too much of our legislation faulty from uncertainty of intention, but much that is useless grows, no doubt, out of the idea of the law-maker that his first duty is to do something, rather than to see whether there is need of his doing anything; like the physician whose first care is the medicine rather

than the diagnosis. Useless laws are an evil of a negative character, working less harm than laws that are positively corrupt or unjust; they imply waste of energy, perversion of energy from the accomplishment of good rather than the direction of energy toward what is bad. The result is none the less undesirable.

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PERHAPS the most serious menace of law-making is the wave of distinctly special legislation that has swept over the country. Legislation has come to be less and less for the benefit of the general public and more and more for that of special individuals or classes; and at times there is suspicion that the public is overlooked for the sake of private interests, under motives that are purely political. Legislation of this character may, perhaps, be more a fault of the East than of the West. When the latter section of the country merits criticism it is usually on the ground that its law-making is too hasty and radical; its laws might well be more conservative and more carefully considered.

Such examples of law-making as the Legislatures of some of the Western States have lately given afford little ground for confidence in the ability of the average legislator, and little reason for respecting his work. They render the conviction strong that the fundamental principles of the common law had best be left alone. Then, too, enactments of some of the older and supposedly more conservative States, give discouraging evidence of the great want of capacity for properly framing legislation.

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NUMEROUS remedies have been suggested to raise the standard of legislation and make it more worthy of respect. That of the Pennsylvania Bar Association is a simple and practical remedy for one phase of the evil. It is, in a word, the appointment of a commission to revise and pronounce upon proposed laws, such commission to be composed of three members who are to have the qualities of justices of the Supreme Court. This measure would ensure a more clear, concise and effective expression of intention, and, so far, would be invaluable; such a commission would undoubtedly arrest much of what is incompetent and ineffective in legislation; but if the people are to maintain respect for law, something more is necessary and the remedy must come from those who are now hostile critics of courts and legislators; the people must exercise the right of suffrage in a manner consistent with their own self respect, and give the power of law-making to those who are competent and conscientious in doing their duty.

## COMMENT.

The maxim, "*Nemo tenetur seipsum accusare*," by its incorporation into the Fifth Amendment of the Constitution has become one of the foundations of our liberty. A mere rule of evidence in England, it is here made a part of the fundamental law, and, so far as we know, is embodied in every State Constitution as well. Its object plainly is to protect the witness himself and no one else, and the compulsion against which he is protected is both physical and mental duress. Many of the States, and Congress also, have passed statutes having for their object the compelling of witnesses to testify even when their testimony would tend to incriminate themselves, by offering them immunity therefor. But these statutes, to be upheld, must be as broad as the Constitutional provision which they seek to supplant and must give absolute indemnity, so that the witness can never be prosecuted for the crime which he may disclose or which his testimony may be the means of discovering. The compulsion of these statutes has been strenuously resisted by those whom it was sought to compel to testify thereunder, by demanding the protection of the Fifth Amendment. Especially numerous have been the controversies arising out of attempts to secure the protection of this amendment against the provisions of the Interstate Commerce Law. The case of *Counselman v. Hitchcock*, 142 U. S. 547, decided that the immunity offered by Revised Statutes, Section 860, was insufficient and that the witness could not be compelled to speak. This was probably the cause of an amendment to the Interstate Commerce Act passed in 1893 to effect the same object, which was sustained in *Brown v. Walker*, 161 U. S. 591 (four judges dissenting) as giving complete immunity.

The proceedings before pension examiners under Revised Statutes, Section 4744, are almost completely analogous to the proceedings before the Interstate Commerce Commission, except that no amendment giving complete immunity has been adopted and Revised Statutes, Section 860, still applies; but they have not been challenged and investigated as fully, probably because of the differences between the two classes of citizens examined. For this reason the case of *United States v. Bell*, 81 Fed. Rep. 830, becomes very interesting. Bell, an ignorant negro, had by the

laxity of our laws, been admitted to the bar and made a Notary Public, and, acting in this capacity, had perpetrated certain frauds on the Pension Bureau, consisting in the fraudulent issuing of certain vouchers and the affixing of his notarial seal to a false affidavit. He was compelled by the pension examiner to come before him for examination, although no subpoena was issued for him, and was then interrogated about the execution of these documents, without being told by the examiner that he had the right to remain silent on any matter that would tend to incriminate him. As was natural for an ignorant negro, who had probably never heard of this constitutional provision, was unaware of his rights in the matter, and was not permitted by the examiner to consult counsel, he swore falsely and the report containing his answers was afterwards introduced in evidence against him on a prosecution for perjury.

All these statutes which seek to compel a witness's testimony by offering him immunity therefor, contain a proviso that no person shall be exempt from prosecution and punishment for perjury committed in so testifying. Of course, if the immunity offered is as broad as the Constitutional provision, the witness may be compelled to answer and as a corollary may be indicted for perjury if he swears falsely. But Counselman's case settled it that the immunity offered by Revised Statutes, Section 860, is not as broad as the Constitutional guaranty, and therefore Bell was not compelled to answer. Whether this proviso that the witness shall not be protected against prosecution for perjury committed during the examination itself is consistent with the protection of the Fifth Amendment has never been decided, and the court here expressly refused to decide the point, holding that the fact that the examination was taken under compulsion and that the witness was ignorant of his rights and was not warned of his privilege alone made the record inadmissible. The witness did not waive his privilege, as he did not knowingly and understandingly abandon it, and the examination was almost purely inquisitorial, as no sufficient safeguards against self-incriminating testimony were thrown around him.

Within the last few years several of the States have passed laws regulating the sale of "convict made" goods. Two of the largest, New York and Ohio, passed in 1894 such laws differing from each other in no essential particular. The Supreme Court of Ohio in *Arnold v. Yander*, 47 N. E. Rep. 50, has recently declared the law of that State to be unconstitutional, as conflicting

with Article I, Section 8, of the United States Constitution—the Interstate Commerce clause. It was made unlawful for any person to expose for sale in Ohio any convict-made goods without first obtaining from the Secretary of State a license; but the act especially provided that it should not affect the products of the prisons of the State of Ohio. In *Mobile Co. v. Kimball*, 102 U. S. 691, 702, commerce is defined as consisting in “intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.” No State Legislature, only Congress, can declare that convict-made goods are not articles of commerce and then discriminate against them or exclude them from the State by unfriendly legislation. And since *Leloup v. Port of Mobile*, 127 U. S. 640, the license fee is a tax upon goods imported from another State and therefore an illegal interference with interstate commerce.

The New York law has not yet been passed upon by its courts, but when the time comes, the same conclusion cannot fail to be reached by them. In *People v Hawkins*, 85 Hun. 43, a kindred law providing that no convict-made goods of other States can be offered for sale in New York State without the label “convict made,” was held unconstitutional on the same grounds as above.

## RECENT CASES.

## CORPORATIONS.

*Proceeding against Stockholder—Set-off.*—*Musgrave v. Glen Elder Farmers' A. Co-op. S. and P. Ass'n*, 48 Pac. Rep. 338 (Kan.). In an action against a stockholder in a corporation to compel payment of his stock liability, he may plead as set-off against the claim of plaintiff creditors the indebtedness of the corporation to himself. In *Mathez v. Neideg*, 72 N. Y. 100, it was said that "the statute liability creates a fund which belongs to the creditors to secure the payment of their debts, but it belongs to all the creditors, as well those who are stockholders as those who are not;" and in *Boyd v. Hall*, 56 Ga. 563, "The fact that he is a stockholder can make no difference." Also in *Jarman's Adm'r v. Benton*, 79 Mo. 155, it was said, that when "the trust fund in dispute is handed over entirely to the suing creditor," he "thereby obtains full preference and satisfaction of his demand, thus obtaining the advantage which was denied to the other creditor, merely because he was a stockholder." See also 2 Beach on Private Corporations, Sec. 277. Mahan, P. J., dissenting, holds that it is the policy of the law to create a fund, a right to which the creditors of the corporation may resort after insolvency, and that neither the corporation nor its members can destroy or abridge this right by contract with each other during the actual existence of the corporation.

*Discovery—Examination of Books before Trial—Examination of Defendant.*—*Stern v. Metropolitan Telephone and Telegraph Co.*, 46 N. Y. Supp. 110. Plaintiff alleged in his complaint that he had been a subscriber of defendant telephone company for some period previous to the time when, on the pretense of putting in a new instrument, defendant attempted to raise the rent of the instrument by a considerable sum. Also, inasmuch as defendant's business was affected with a public use and in essence a monopoly, and a common carrier for hire of oral and written messages, it was under an implied contract to furnish its service for a reasonable sum. Defendant's answer put in issue the charge that the new sum demanded was unlawful, unjust and illegal, stating that the expenses of operation increased in greater proportion than the number of subscribers. Defendant did not attempt to give figures to sustain its contention, and the court held that under the circumstances plaintiff had a right to demand an examination of the books and officers of the corporation *before* the trial, it being not certain that such examination could be had during the trial, as the affidavits showed the president and the treasurer to be non-residents of the State. The court quoted *Presbrey v. Public*

*Opinion Co.*, 6 App. Div. 600, 39 N. Y. Supp. 957, as illustrative of several decisions denying the accuracy of defendant's statement that such an examination is never held to be necessary after issue joined, when it appears that the examination can be had at the trial, except where fraud is alleged, or some relation of trust confers a present right to know the facts to be elicited at the trial.

#### RELATIVE RIGHTS.

*Money Lost by Agent—Recovery by Principal.*—*Thompson v. Hynds et al.*, 49 Pac. 293 (Utah). Where a husband has been entrusted with a sum of money by his wife for the specific purpose of investing it for her in mining stocks, and has testified that he gambled it away to defendants; *held*, that he was acting in the capacity of her agent, and she as principal can recover it back, as the transaction gave defendant winners no title to the money. *Pierson v. Fuhrmann*, 27 Pac. 1015; *Mason v. Waite*, 17 Mass. 560; *Keener Quasi Cont.*, 183, 188, and others quoted.

*Right of Action—Compelling the Discharge of a Servant.*—*Perkins v. Pendleton*, 38 Atlantic Rep. 96 (Me.). A servant has a right of action against a third person who has unlawfully and by improper means procured his discharge from an employment and on account of which he has suffered injury. This is held to be so even though the master might have lawfully discharged the servant of his own accord. This case is somewhat different from *Lumley v. Gye*, 2 El. and Bl. 216, and *Bowen v. Hall*, 6 Q. B. Div. 333, and the early American and English decisions following them. It is held in these cases that the employer has a right of action against a third person who unlawfully procures a breach of contract of service. *Perkins v. Pendleton* holds there is no distinction and that the rule applies, both upon principle and authority, where the employer is induced to break his contract or where it is broken by the employee.

*Support of Child—Liability of Father after Divorce.*—*Dolloff v. Dolloff*, 38 Atl. Rep. 19 (N. H.). A divorce procured by the mother with alimony and custody of the child, does not release the father from the obligation to support the child. Alimony is not maintenance to the children but to the wife.

#### MISCELLANEOUS.

*Power of Congress—Postal Regulations—Right of Citizen to Use Mails—Due Process of Law.*—*Hoover v. McChesney*, 81 Fed. Rep. 472. Congress has the right to exclude from the mails such matter as it may deem injurious to the morals of the people; but it has never yet been held to have the power to delegate to an executive officer the power to determine the person or persons who shall be excluded from the right of sending and receiving mail by the postal system. For an



executive officer to exclude a citizen from the use of the mail, because, in that officer's opinion he at some previous time had violated the law by using the mail in an improper manner by sending unmailable matter, is an exercise of judicial and not executive authority on the part of such officer. The use of the mail is a right, and an order of the Postmaster General which finds complainant guilty of a violation of the postal laws, and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned, is not due process of law, within the meaning of the Fifth Amendment to the Constitution. See especially *Ex parte Jackson*, 96 U. S. 727; *Association v. Zumstein*, 67 Fed. 1000; also *Dartmouth College Case*, 4 Wheat. 518; *Bank of Columbia v. Okely*, 4 Wheat. 235.

*Collision—Liability of City for Negligence of its Fire Tug.*—*Thompson Nav. Co. v. City of Chicago*, 79 Fed. Rep. 984. In a libel *in personam* against the city of Chicago, growing out of a collision between the city's fire tug and libellant's propeller, the circumstances were such that had the tug been owned by private parties, and engaged in private enterprise, there could be no doubt of their liability for the injury done. *Held*, that the city was liable *in personam*. In *U. S. v. The Malek Adhel*, 2 How. 209, Mr. Justice Story made it apparent that the liability of the owner, to the extent of his vessel, for injuries resulting from negligence or misconduct is not dependent upon any relation of master and servant, or principal and agent existing between him and crew, but rests solely upon the fact of ownership. So, although at common law the city is not liable for the negligent acts of the fire department, on the ground that the members of the fire department are not the servants of the city in its corporate capacity, yet it is liable in this case for the injury done by the vessel by virtue of the mere fact of ownership. Where such liability exists certain political bodies are sometimes exempted, but solely on the ground of public policy (*The Siren*, 7 Wall. 152), and this exemption stops short of city government. The decision in *The Fidelity*, 16 Blatchf. 569, Fed. Cas. No. 4,758, is followed in so far as it maintains that an action *in rem* cannot lie against the boat, lest its seizure disarm the city, even temporarily, of its equipment to put down fires; but is disapproved in its conclusion that the city is also not liable *in personam*.

*Conspiracy—Funeral Directors' Association—Refusal to Sell Goods to Debtors.*—*Brewster v. Miller et al.*, 41 S. W. Rep. 301 (Ky.). In an action brought to recover damages against a funeral directors' association for refusal of its members to sell goods to plaintiff on the ground that he was already in debt to one of its members, the fact that the association was a pool to regulate prices in violation of the statute (Ky. St. sec. 3915), would give plaintiff no right to action against it ("*Addison on Torts*," vol. 2, sec. 850). Nor is an article of the association directing its members not to sell to one who refuses to

pay a previous debt to any of its members contrary to the statute, or an offense at common law (*Cooley on Torts*, p. 278; *Schulter v. Brewing Co.*, 90 Ky. 224, 28 S. W. 504). The case is distinguished from *Carew v. Rutherford*, 106 Mass. 1, where a mechanic, under the necessity of employing workmen, was held to have been compelled by duress to pay a sum of money which he was under no legal obligation to pay, in consequence of a conspiracy which induced the workmen to leave his employ. In the present case, even if the particular article was intended to force plaintiff to pay a debt which he did not owe, still no cause of action existed, as he did not pay the sum demanded.

*Riparian Rights—Respective Rights of Owner and Public.*—*Pollock v. Cleveland Ship-building Co.*, 47 N. E. Rep. 582 (O.). The defendant, a shipbuilding company, in arranging derricks to repair vessels, carried lines in front of and across a portion of the plaintiff's river bank and tied them to posts and piles driven upon its own land. Held, in an action of trespass, that the public is entitled to moor vessels for the purpose of repairs, putting in machinery, etc., opposite the land of a riparian proprietor, but that such right does not extend to the use of lands not covered by water.

## BOOK NOTICES.

*Handbook on the Law of Equity Pleading.* By Benjamin J. Shipman, author of "A Handbook of Common Law Pleading." Law sheep, 632 pages. West Publishing Co., St. Paul, Minn., 1897.

We gladly note from the standpoint of the student the improvement in the method of treatment over some previous volumes of the Hornbook Series. The reasons for the existence of a rule, which are so necessary to its accurate application to new facts, seem to be clearly brought out, a defect which has made some of the series unsatisfactory to learners. Without much explanation on the part of the instructor, the student has too often committed to memory rather than intelligently learned the law. In the past too many cases have been cited without carefully showing distinction according to principle. Again the noticing of late statutes has tended to confuse the mind of the student. This last feature makes the books more valuable to the practising lawyer, while the other matters are not deemed so essential by him.

To every lawyer the arrangement of the chapter on Equitable Bills must prove of great convenience in drawing up his pleadings. The bill applicable to each equitable remedy is separately treated. For example, in the case of Interpleader, there is first a succinct statement of the purpose of the bill, then a direction as to what "the bill must essentially contain." This is followed by the special requirements, such as the affidavit. With this single page before him the pleader can feel confident that he has introduced all the necessary averments into his bill.

Mr. Shipman is a graduate of the Yale Law School in the class of 1876.

*The Negotiable Instruments Law.* By John J. Crawford of the New York Bar. Half law sheep, 144 pp. Baker, Voorhis & Co., New York, 1897.

Although lawyers have a deep-rooted objection to legislative doings in general the declaratory statute upon so complicated a subject as bills and notes has been heartily welcomed. To inform the public as to the sources of this act and to aid in its understanding the drawer of the statute has published in book-form the law as adopted in New York, Connecticut, Colorado

and Florida, with annotations. This puts the act in a convenient form for reference for business men and the practicing lawyer, and furnishes them with the decisions upon which the statute is based. The student also will find great aid in using it as a text book upon the general subject. The principle is laid down succinctly, and in a note are the cases pro and con, with frequently an extract from a decision showing the reason of the rule. Thus at page 10, where it is declared that a provision for the payment of attorney's fees will not make a note uncertain, twelve cases are cited in support of and six against the rule, together with a quotation of eleven lines from a cited opinion. The book is most timely.

*Common Law Pleading : Its History and Principles.* By R. Ross Perry, Lecturer on Common Law Pleading in the Georgetown (D. C.) University Law School. Octavo, law sheep, 493 pages. Little, Brown & Co., Boston, 1897.

That Mr. Perry is a scholar and a teacher conversant with the needs of the student can be seen from the most cursory reading of his "Common Law Pleading." The book is written from the standpoint of the student searching after the origins of rules in order to explain their existence. Chitty's rules with respect to actions, Stephen's Rules of Pleading, and Dicey's rules as to the selection of parties to actions form the skeleton of the work. To these are added extended illustrations from decided cases, and the fruits of late researches by such investigators as Pollock and Maitland in England, and Holmes, Armes and Thayer in this country. By this method are cleared up the intricacies of a subject generally considered the most difficult in the curriculum. Mr. Perry has made the subject interesting from the start, which is no slight cause for praise.

## MAGAZINE NOTICES.

The following are some of the articles of especial value to the lawyer, appearing in late legal publications:

*Albany Law Journal :*

- July 3. Riparian Owners—Rights in Land Under Water,  
James M. Kerr.  
July 24, 31. Contempt by Publication, . . . Arthur C. Mayer.  
October 2. Jurisdiction of the United States over Places  
held for Public Purposes, . . . G. Norman Lieber.

*American Law Register and Review—September and October :*

- Principles of the Law Relating to Corporate Liability for Acts  
of Promoters, . . . Malcolm Lloyd, Jr.

*American Law Review—July—August :*

- License Relating to Real Property, Whether Revocable, Leonard A. Jones.  
Validity of Marriage where the Contract is entered into in a  
Jurisdiction other than that of the Domicile of the Parties,  
W. C. Rodgers.  
Setting up Fraud and Illegality under the General Denial,  
Seymour D. Thompson.

*American Law Review—September—October :*

- The Relation between Assumption of Risks and Contributory  
Negligence, . . . C. B. Lobatt.  
The Right of the Public to Regulate the Charges of Common  
Carriers and of Others Discharging Public or Quasi-Public  
Duties, . . . Walter Clark.

*Central Law Journal :*

- July 9. The "Excess and Deficiency Clause" in Bills of  
Lading, . . . Irving Browne.  
July 16. Is what a Jury sees Evidence when Ordered out by  
a Court to make a View of Premises,  
July 23. Proof of the *Corpus Delicti* in Poisoning Cases, Arthur P. Will.  
July 30. Effect upon General Creditors of Deeds or Mort-  
gages Withheld from Record, . . . W. W. Thornton.  
Aug. 6. Recent Phases of Contract Law. III. Breach by  
Renunciation before Performance, . . . John D. Lawson.  
Oct. 1. Mandamus against Corporations to Compel Duties  
by Individuals, . . . Seymour D. Thompson.

*Green Bag—October :*

- Inviolability of the Human Body, . . . Irving Browne.

*Harvard Law Review—June :*

- Theory of Post-Mortem Disposition: Rise of the English  
Will, . . . Melville M. Bigelow.  
Situs of Choses in Action, . . . Hollis R. Bailey.

*University Law Review—August :*

- Mandamus to the Governor of a State, . . . Ivan W. Goodner.

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## SOME PECULIARITIES OF OUR NATIONAL MINING LAW.

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To the minds of those familiar with the common law governing the acquisition of title and the ownership of real property, many of the rules applicable to mining rights under the Acts of Congress will appear, to say the least, anomalous. Such radical departures from the common law have been made that, at first blush, one would be impelled to say,—This cannot be. It must be remembered, however, that the Acts of Congress apply only to mining rights upon the public domain. The general government, being the absolute proprietor of the lands in which these mines are found, has full power and authority to determine how such rights may be initiated and continued, how they may ripen into absolute title, and what extraordinary rights may be acquired and vested with them.

Time and space will permit only a most cursory reference to some of the peculiar rules governing the acquisition, use and ownership of this class of property, and peculiar rights attaching thereto.

Ordinarily, no fixed rights to the agricultural lands of the government can be acquired, until after they have been surveyed under governmental supervision, but mines may be located and patented on unsurveyed as well as upon surveyed lands. All of the unoccupied public domain containing any of the minerals mentioned in the statute is open to exploration, appropriation and purchase. It is proper to say, however, that this law does not apply to the older States in which there is no public domain, nor does it apply to the States of Michigan, Wisconsin and some others, by express exception in the Act itself.

Any person, a citizen of the United States, or who has declared his intention to become such, is qualified to enter upon the unappropriated public mineral lands of the United States, and initiate a right or title to a mining claim.

Reference will be made to only three of the many peculiarities of this law:

*First:* The origin of the law.

*Second:* The method of initiating the right, and of its continuance.

*Third:* The extralateral rights.

The consideration of these subjects should probably be prefaced by the explanation that these laws recognize and provide for two general classes of mines or mining rights, viz., claims upon veins, leads, lodes or ledges; and claims upon placers. The classification depends upon the character of the deposit, and while the general rules for the acquirement and continuance of rights to each class of claims are the same, there are many differences in the law applicable to collateral rights thereunder.

Theoretically, at least, all precious metals are supposed to have been originally deposited under the same general conditions, viz., in fissures, rents, cracks or crevices in the earth's crust formed by some force of nature, or along the contact between different rock formations. The precious metals thus deposited are found intermingled with quartz or other rock in the crevice or fissure, or along the contact; or in combination with other metals found therein. This fissure, crevice or contact, with its filling, is known as the vein, lead, lode or ledge.

Placer claims or mines are those where, by processes of nature, the gold has been removed from these fissures or crevices, separated from its former companions, and deposited in a comparatively pure state among the earth, gravel and debris, along the streams and creeks, and the benches adjoining.

It would be useless to attempt to explain the operation of the forces of nature which have brought about these existing conditions. The law recognizes things only as it finds them, and does not concern itself with the method by which they are brought about.

#### FIRST: THE ORIGIN OF THE LAW.

Prior to the discovery of gold in California it is believed that nothing approaching the present mining law existed in this country. It first rested in the customs of miners, and their mining rules and regulations, adopted in the different districts. It

was then recognized by the Legislature and courts of California upon their organization, and subsequently crystallized into statute law by an Act of Congress of the United States.

Its origin and development furnish an interesting page in the history of our country. Considering the conditions existing immediately after the discovery of gold in California we can but be amazed at the order which was wrought by the miners, out of existing chaos. Thousands of all classes of people flocked there, allured by visions of sudden wealth. The worst elements of society were well represented, because of the opportunities afforded to ply their nefarious vocations. The country was new, the interests novel, and there were no positive rules of law to guide the miners, and if there had been, there were at first no organized courts to which they could apply to settle their difficulties, protect their rights and redress their wrongs. In the absence of all these, the miners were compelled to take care of themselves and their property, and at an early day, by common consent, recognized certain usages and customs, and adopted certain rules and regulations for their guidance. They made their own laws, established their own courts, and enforced obedience thereto. In many instances their proceedings were summary, but necessarily so in order to be effective. Probably many of them had worked in the tin mines of Devon or Cornwall, or in the lead mines of the County of Derby, and were familiar with the laws applicable to this peculiar species of property in force there; many probably came from the southern country, and brought with them the customs, usages and rules of the Spanish and Mexican mining laws. Many of these customs were of extremely ancient date. Doubtless great assistance in formulating these mining rules and customs was derived from these sources. The American himself probably was absolutely wanting in experience of this kind. However this may be, sure it is that a majority of them were impressed with wholesome ideas of justice and equity, between man and man.

Chief Justice Sanderson of California uses the following very apt language, with reference to these customs and usages: "These usages and customs were the fruits of the times, and demanded by the necessities of communities, who, though living under the common law, could find therein no clear and well defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results."



Illustrating the love of justice and equity which predominates in our people everywhere, these miners, as if by common consent, adopted the rule that discovery of the precious metals was the basis of a mining right, and that to him who made the discovery should go the fruits thereof. The custom was recognized among them that he who discovered the metals had the first right to appropriate to his use a reasonable amount of the surface of the ground in which they were found. It can be readily seen that without the adoption of some rule of this character, none would have been safe in any rights. Scrambling possession would have followed, broils would have been engendered, and physical force would have been the test of right. But this was all settled amicably and equitably, by all the miners protecting each other in the discovery of mineral in his claim, and in the exclusive possession of the ground containing such mineral.

The second step recognized by the miners was the appropriation or location of mining rights or claims, by the person making the discovery. After this was recognized it appeared that some rule was necessary to provide how the rights thus initiated should be continued. The object of all the miners was, to extract the precious metals from the earth, and it seemed proper that no one should be allowed to practice the act of the dog in the manger. No one ought to appropriate the land and the minerals therein, and allow them to rest undeveloped. For the purpose of settling this question it was determined that the holder of each claim should work and develop it, as a condition of continued possession. Of course all were trespassers. The general government was the absolute owner of the ground, and of all the minerals contained therein, but so long as the Government made no objection—did not try to eject the miners from their claims or compel them to account for the precious metals they found—they continued their operations under their own laws.

These laws were strictly enforced by the miners, although they rested purely in custom, usage and adopted rules. They had only the inherent force of law, because of the determination of the miners that, for their own protection, they should be obeyed.

It is a great compliment to the sagacity, common sense and inherent ideas of right and justice of the early miners in California, that the three principal rules relative to the acquirement of mining claims as thus established by them were recognized by

the courts and Legislature of California, as soon as they were organized, and that they were subsequently made the basis of the present mining law by Acts of Congress.

The organization of mining districts and the adoption of rules and regulations, customs and usages by the miners in such district, governing all alike within their respective boundaries, are equally interesting, but want of space forbids any further reference.

In 1866 Congress enacted a law, recognizing the possessory rights of miners, and later, during the same session, enacted a law whereby the veins, leads, lodes or ledges could be patented to the claimants; only possessory rights to placer claims were recognized until 1870, when Congress provided a method for the claimant to procure absolute title also to that class of property by patent.

In 1872 Congress modified the Act of 1866 and reenacted the placer Act of 1870, and in effect codified the general mining laws of the United States, and, with few amendments since adopted, this Act is now the law in force.

#### SECOND: THE METHOD OF INITIATING THE RIGHT, AND OF ITS CONTINUANCE.

Although the provisions of the law relative to the location of claims on veins or lodes, are made applicable to the location of placers, as far as possible, there are some departures and some rules relative to claims on veins, lodes, leads or ledges, which do not apply to placers, and for the purpose of reaching the broader class, reference will only be made to the latter.

Inasmuch as only public lands valuable for the minerals mentioned in the statute are open to appropriation, the first question to be determined is the character of the land, *i. e.*, whether or not it is mineral. In view of this the statute, following the customs of miners as hereinbefore referred to, has provided that the initial step in the acquirement of a mining claim shall be that of *discovery*. This is the acquirement of knowledge of the existence, in the ground sought to be appropriated, of some one or more of the minerals mentioned in the statute. When discovery of any of these minerals is made in a vein and of sufficient value to warrant exploitation with a reasonable belief that it will be found in paying quantities, it is sufficiently demonstrated that the character of the land sought to be appropriated is mineral, and is therefore rendered susceptible of appropriation under the statute.

The mineral character of the land having been determined by a discovery, the next step toward a complete appropriation is designating the surface area sought to be claimed. This is accomplished by marking the claim sought to be appropriated, so that its boundaries can be readily traced upon the ground. The marking consists of placing properly marked stakes or monuments, or marking blazed trees, at each corner of the claim, and at such other points along the boundary lines as may be required by local rules or regulations and the statutes of the State or Territory in which the location is sought to be made. The claimant on a lead, lode, vein or ledge is allowed a surface area of 600 by 1,500 feet—1,500 feet along the course or strike of the vein, and 300 feet wide on each side from the center of the vein. An ideal location, therefore, is a parallelogram 600 by 1,500 feet, with the vein running through the center from end to end. The lines which mark the width of the claim and cut the course of the lead or vein are denominated "end lines"; those which mark the length of the claim, and, theoretically, run parallel to the course or strike of the vein, are denominated "side lines."

The next step in the appropriation of the claim is the posting of a notice upon the claim (unless some local rule, regulation or custom, or the statute of the State or Territory requires it, this need not be done). This notice, when required, usually contains a statement that the locator or claimant is a citizen of the United States, or has declared his intention to become such; that he has complied with the provisions of the Act of Congress, and the local rules, regulations and customs of miners, and the statutes of the State or Territory; that he claims a certain distance along the vein or lode, each way from the point of his discovery, not exceeding 1,500 feet in all, with a width of not exceeding 300 feet on each side of the center of the lode or vein; it then gives a general reference to the locality in which the claim is located; then follows a specific description of the markings of the boundaries of the claim; it concludes with the date of the location and the name of the claimant. This notice should be posted at or near the point of discovery, so that any other prospector will be able to see it, and ascertain therefrom that a certain portion of the public domain has already been appropriated, and govern himself accordingly.

Congress authorizes the miners of the district, or the Legislature of the State or Territory, to require a record of the location to be then made, and provides that if such record be required it

shall contain the name of the locator, the date of the location, and such a reference to some natural object or permanent monument as will identify the claim. Such record is usually required and when required it is one of the steps necessary to be taken in completing the location. The record is made by recording in the office of the Register of Conveyances in the county where the claim is situated, or if there be no county organization, with the District Recorder, a notice or declaratory statement of the location, containing the matters required by Congress and the local rules or statutes, to be stated therein. The effect of a valid location is to segregate the area located from the public domain, and the claimant acquires a species of title therein which is denominated real-estate. Indeed, it has all the attributes of real-estate. It may be conveyed, seized and sold under process, and descends to the heirs. So long as the claimant complies with the conditions of continued possession prescribed by the law, even the government itself cannot oust him or forfeit his right. True, the legal title is in the government until patent is issued, but it is held in trust for the locator, and relates back, upon the giving of patent, to the date of location.

The condition of continued possession and ownership is, that the claimant, until final entry in the Land Office upon application to purchase, shall perform at least one hundred dollars' worth of work on the claim each year. This may be done at any time from January 1st to December 31st of each year. If it is not done, or not fully done, the location and all the rights of the claimant therein are forfeited. The land reverts to the public domain, and again becomes open to location by any qualified person. The law, however, gives the claimant one further opportunity, by providing that no forfeiture shall take place if the claimant, before other rights intervene, recommences on the claim in good faith. But he must then complete at least one hundred dollars' worth of work upon the claim.

The process by which patent is obtained, in the absence of adverse claims, is very simple, and it would serve no useful purpose to go into detail in regard to it.

### THIRD: THE EXTRALATERAL RIGHT.

One peculiarity of a vein, lode, lead or ledge, is that it almost always, on its descent into the earth, departs from the perpendicular, the angle of departure so varying as to leave the vein in any position from one almost perpendicular to one almost horizontal. This departure is called, in mining parlance,

the "dip" of the vein or lode. The run or length of the lode horizontally is called its "strike" or "course." The top of the vein or lode, or that portion next the surface of the earth, is denominated its "apex."

Of course the value of the mine is in the veins or lodes, and the surface ground is in the nature of an incident, to enable the claimant to properly carry on his mining operations in connection with his veins or lodes. In many instances the dip of the vein is so great that, in its descent into the earth it soon passes through a plane dropped perpendicularly through the exterior boundary line of the claim, toward which it dips. Under the ordinarily recognized rule of real-property the owner of the vein, as soon as it passed through this plane, would lose all right to it, and it would belong to the adjacent proprietor into whose ground it passed. Many veins show but little value before this point of departure is reached, and if the owner of the claim then lost it, and the adjacent proprietor acquired it, the claimant might have spent many thousands of dollars in developing a mine for his neighbor, who, possibly, had made no expenditure.

Congress recognized the inequity of such result, and for the purpose of avoiding it, and as a premium to the man who is willing to spend his money in developing his property and adding something to the substantial wealth of the nation, enacted the following as a part of the general mining law: "The locators of all mining locations heretofore made or hereafter to be made on any mineral vein, lode or ledge situated on the public domain, their heirs and assigns \* \* \* shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all the veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical lines of such location. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own directions that such planes will interest such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another."<sup>1</sup>

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<sup>1</sup> Sec. 2322, Revised Statutes U. S.

One would think that the extralateral right hereby granted was most easy of enforcement; that the statute was plain and required no construction. If all locations were such as the statute contemplated, this conclusion would be correct. Recalling your attention for a moment to an ideal location. You can readily see therefrom what was intended by this section, and appreciate how easily it could be applied. Imagine a rectangular piece of surface ground 600 by 1,500 feet, with a vein, on its course or strike, running lengthwise through the claim from end line to end line, with its center equidistant from the two side lines, as shown in Fig. 1.

FIG. NO. 1.

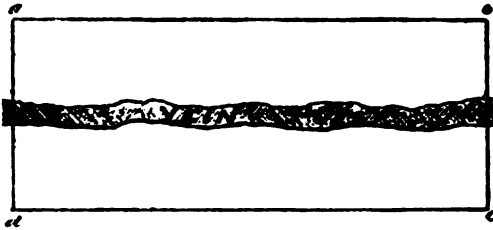


FIG. NO. 2



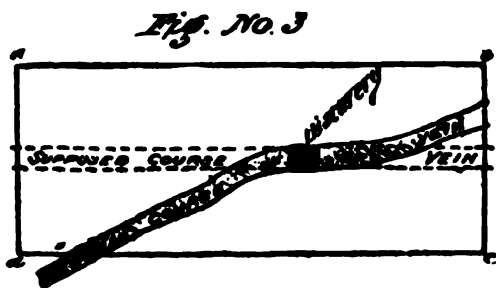
Suppose the vein dips to the south; taking a cross-section of the ground we see the vein on its dip, passing through the south side line of the location. Fig. 2.

Under such circumstances the intent of the statute is quite plain and no disputes could arise. The locator having 1,500 feet of the vein on its strike or course would have an equal amount on the dip to an indefinite depth.

Unfortunately, an ideal location is the exception instead of the rule. Indeed, when we consider the existing conditions at the time of location, we must wonder that an ideal location is ever met with. As a rule, wherever veins are found the surface of the ground is rugged and irregular, frequently covered by a dense growth of timber. The apex of the vein at one end of the location may be near the surface, or even exposed, while at the other end it may be buried many feet deep. Again, veins seldom run, on their course or strike, in a straight line. Many conditions may influence this—the contour of the country, such as the hills or the ravines. Natural influences at or after the formative period may have disturbed it. In 1,500 feet, or the length of the location, the course of the vein may change many degrees. So that, without actual exposure of the apex of the

vein for the entire length of the claim, before marking the boundaries of a location, the prospector has no means of being assured that his vein passes through the claim as located, from end line to end line. To expose the vein for the entire 1,500 feet before marking the boundaries of the location would require more time than the statutes usually allow, and, in many instances, more money than the average prospector could possibly expect to obtain during his natural lifetime. The prospector therefore must use his best judgment in laying his location, and must bear the consequences if he makes a mistake.

To illustrate the results, even where sufficient unoccupied ground is found to make a full location, consider Fig 3.



to obtain an idea of its general direction. He then projects this course to the east and west of his discovery, to the extent of 1,500 feet. He then marks his location upon that theory. If the vein continues in the supposed direction through the claim it might be represented by the two dotted lines. Upon subsequent development, however, the prospector finds that the course of the vein in his location is actually as represented by the black line, the vein passing out of the claim at the east end line and at the south side line.

The effect of such complications, and others, will be called to your attention later on.

Two principles have been announced by the Supreme Court of the United States relative to Section 2322:

*First.* That wherever a vein cuts the boundary line of a claim on its course or strike, such line becomes an end line, in so far as the application of the law of extralateral rights is concerned, and this irrespective of the designation the locator may have given to the particular line, upon the ground.

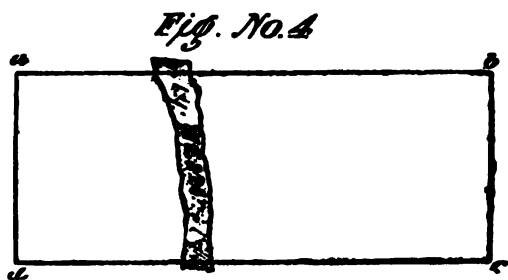
*Second.* That in order that a claim should have extralateral rights, its end lines, as determined by the course or strike of the vein in cutting the boundaries of the claim, must be parallel.

Applying these two principles to actual conditions as devel-

oped, many problems difficult of solution present themselves, although the section above quoted seems clear. I am of the opinion that under certain circumstances the Supreme Court will follow the later decisions of the Federal Courts and some of the State courts of last resort, and modify the second proposition for the purpose of preventing the destruction of extralateral rights in certain cases. It would extend this article to an unwarranted length to attempt to discuss or determine the extent of extralateral rights in particular cases. We will content ourselves for the present by calling attention to the many difficulties to be

encountered in applying the above section of the statute, and for that purpose some illustrations may be presented.

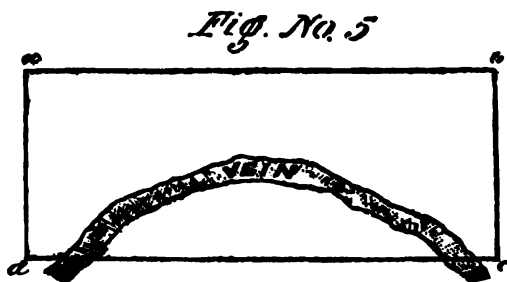
Suppose the vein passes through the location as shown in Fig. 4, cutting both



side lines. Where are the extralateral rights here?

Suppose another situation where the vein passes in and out of the same side line. See Fig. 5. What is to be done under these conditions?

Again, suppose all the ground except a triangle has been patented and a prospector discovers a valuable vein within the surface ground of this triangle and locates a claim. Of

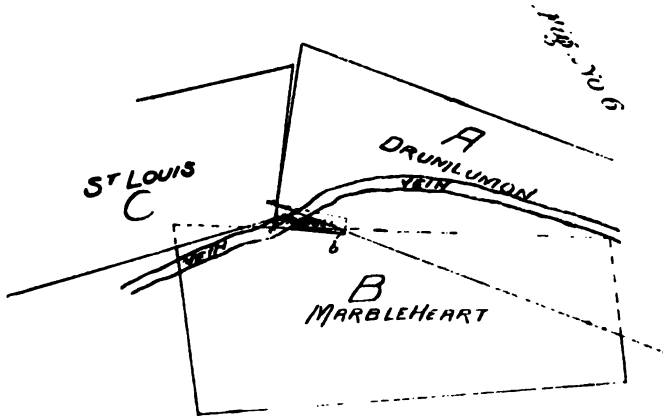


course he can only acquire the surface rights to the vacant land. The land between the patented claims A, B, C, in the form of a triangle, is open to location, and a vein runs through it. See Fig. 6. Suppose a prospector locates it and the vein dips towards the claim marked B; what are his extralateral rights? He can have no parallel lines at all for the vein to pass through on its course.

As a further illustration, suppose the vein on its course passes through an end line, and a side line of the location as marked by the locator on the ground, as shown in Fig. 7. If



both lines cut by the vein on its strike are end lines, in so far as extralateral rights are concerned, and such end lines must be



parallel to give extralateral rights, the problem presented is not easy of solution, unless we say no extralateral rights attach to such conditions. Our courts, however, have made an equitable determination of this, which it is believed the Supreme Court of the United States will eventually adopt.

One more condition may be referred to. See Fig. 8. In this instance a location was sought to be made of a vein presenting a semi-circular apex. There is no objection to making a location in this or in any other shape. There is no requirement that a location shall be in the form of a parallelogram, or that it shall have any particular number of boundary lines, or that any of its lines, except the end lines, shall be parallel.

All of these illustrations are practical questions, which mining lawyers and the judges are called upon to solve, and all of them are actual cases, already considered and decided by the courts.

To make the application of the doctrine of extralateral rights a little more complicated and uncertain, questions frequently

Fig. No. 7



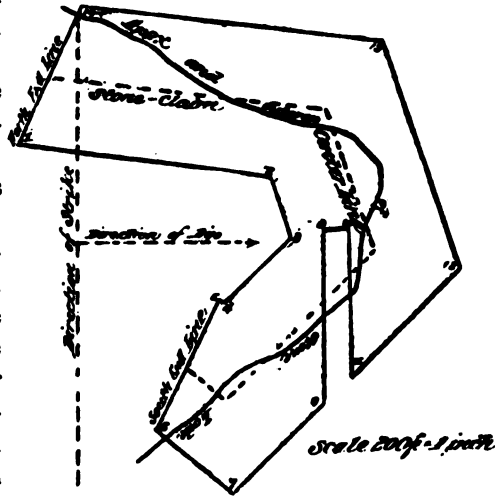
arise as to whether the vein found in the adjacent ground, is really the same vein which has its apex in the claim of the locator. Veins are as erratic on the dip as on the strike. Forces of nature have played with them in the same way, and may have thrown parts of the vein, with its enclosing formation, many feet out of the place in which it originally existed. So that, in some instances, it is almost, if not entirely, impossible to show continuity of the vein, from the claim having the apex thereof, into the adjacent ground. For example, take a cross-section of a location with the underground vein as shown in Fig. 9.

The veins A and B may at one time have been parts of the same vein, B having been a continuation of A. Through some operation of the forces of nature the entire formation within the location including the vein is dropped down, completely breaking off the vein and removing it many feet from its former position. If the owner of the location claims the right to follow the vein upon its dip into the adjacent ground he must be prepared to prove that vein B is a continuation and portion of vein A. One

*Fig. No 9*

can readily imagine how difficult this may be, especially when the development of the vein from the surface down to the point of breakage, and from the top of vein B towards the surface has not been completed.

Again, frequently the walls or sides of the vein upon its dip approach so closely together as to leave it questionable whether the vein itself does not entirely cease. Further development, however, downward, on the

*Fig. No. 8*

The question then for determination is, whether these two parts are all one vein, or whether they are two separate veins.

It is apparent, therefore, that many difficult and interesting questions have arisen under the apparently plain terms of this section, and it is more than probable that other complicated conditions will develop presenting other equally difficult problems.

In conclusion, I cannot refrain from saying that the general subject of mining law is constantly growing in importance, and yet there is less known about it, and less effort made to furnish law students an opportunity to familiarize themselves with it, than any other branch of jurisprudence. The student who expects to practice his profession in the large cities of the East should not delude himself into the belief that it will be unimportant to him. It must be remembered that millions of dollars of capital from eastern moneyed centers are invested in mining enterprises, and a well-equipped lawyer should be prepared to advise his client with reference to all his business and legal transactions.

*Jno. B. Clayberg.*

HELENA, MONT., November 1.

## THE INFLUENCE OF THE EIGHTEENTH NOVEL OF JUSTINIAN.—II.

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### III.

#### THE LIMITATION OF TESTAMENTARY DISPOSITION.

By the law of the Twelve Tables intestate property devolved first to *sui heredes*, then to the nearest agnate, and finally to the gentiles.

The prætorian edict passed the intestate's estate: first, to the children, emancipated and unemancipated; second, to *sui heredes*, and in default of these to the nearest agnate; third, to cognates; fourth, to the surviving husband and wife (Sohm's "Institutes," 439-42).

The 118th Novel of Justinian decrees intestate property: first, to the descendants; second, to ascendants, brothers and sisters of the whole blood, and children of pre-deceased brothers and sisters; third, brothers and sisters of the half blood and their children; fourth, nearest collaterals.

We now pass from intestate to testate succession. The transition of ownership from the family to the individual in Roman law, we have traced *supra*. The change as indicated was of a slow growth, and necessarily even when individual ownership was fully developed left remains of collective ownership.

M. Tarde mentions the right of *le retrait simplement lignager* (family recovery); that is to say, "the right accorded to relatives of the vendor to buy out in the same manner the purchaser foreign to the family," as a survival of the family right of ownership and as a limitation upon the individual right of property (*Les Transformations du Droit*, p. 66, and note).

"The title of the relatives of the deceased, and more especially of his own children, to succeed him on his death, is based on a rule of law, on a legal necessity, on the fact that, prior to his death they were co-owners of the property. \* \* \* The idea of private ownership was destined to outstrip the traditional conception of family ownership, and the individual was allowed, through the medium of a will, to realize his absolute right of dis-

position (*i. e.*, his sole ownership), as against the family even after his death. \* \* \* The claims of certain very near relations are so strong that they survive the recognition of individual ownership. \* \* \* The view that there may be a succession contrary to the will, a succession by necessity, gains acceptance. In the old law these rules concerning succession by necessity mark the limits within which the conception of family ownership continues to operate on that of individual ownership" (Sohm's "Institutes," 409).

"The idea that property really belongs to a family group, and that the right of an individual is merely to administer his share of it during his lifetime, may be said still to survive in those provisions against the total disinheriting of relations which modern systems have borrowed from Roman law, and less obviously in the rights given to next of kin under statutes of distribution. The feudal doctrine as to the succession of the heir at law to real property, and of escheat in default of an heir, to the lord of the fee, is widely different in character. It is a consequence of this latter doctrine, that no one individual is recognized by English law as succeeding to all the rights of an intestate who dies leaving both real and personal property, and that the heir and the administrator divide between them what under the Roman system devolved wholly on the '*heres*'" (Holland's "Juris.," 142-3).

Let us now consider the right of testamentary disposition of the Law of the Twelve Tables as limited by the *Lex Falcidia* and the Eighteenth Novel of Justinian.

"For since formerly by the law of the Twelve Tables the right of bequest was free so that it was lawful to pay out indeed in legacies the whole patrimony; truly in such manner it was provided by this law: 'thus be the law as he has bequeathed his estate.' It has seemed best to limit this right of bequest, and this was provided for the sake of testators themselves on this account, because frequently (testators) used to die intestate for the reason that the appointed heirs refused to make *additio* to the inheritance because of little or no gain. \* \* \* The *Lex Falcidia* has been passed most recently by which it is decreed, that it is not permitted to bequeath more than three-fourths of all the goods: that is, in such a way, that whether one or more heirs are appointed, a fourth part should remain with him or them" ("Institutes," II., 22, pr.).

The Eighteenth Novel "raised the amount of the statutory share to one-third of the intestacy share where the portion of

the inheritance which the claimant would have taken on intestacy amounted to at least one-fourth of such inheritance, and to one-half of the intestacy share, where such portion amounted to less than one-fourth of the inheritance" (Sohm's "Institutes," 467; *vide* 18th Novel *post*).

Sale's translation of the "Koran," page 60, reads: "God has thus commended you concerning your children. \* \* \* If ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye bequeath, and your debts be paid."

We are now to see what has been the influence of the increasing of the intestacy share of children decreed by the Eighteenth Novel on subsequent foreign systems of law, and first of legitimate children.

#### LEGITIMATE CHILDREN.

Grotius' "Dutch Jurisprudence" (Herbert's translation) page 133: "Sec. 8. These children must be instituted as heirs in the aggregate to one-third share at least of that which they would have derived from the estate by succession, profit and loss together included; but in case the children exceed four in number, then they must be instituted as heirs for one-half, as before; these shares are called their legitimate portion. Sec. 5: But there are some who not only may, but even must, be instituted heirs; namely, children."

The French Civil Code provides: "913. Liberalities, either by acts of gift, or by will, can not exceed a moiety of the property of the disposer, if he leaves at his decease but one legitimate child; a third, if he leaves two children; a fourth, if he leaves three or a greater number. 914. Descendants in whatever degree they may be are comprised in the preceding article, under the name of children; nevertheless, they are only reckoned for the child whom they represent in the succession of the disposer.

"915. Liberalities, by acts of gift or by will, cannot exceed a moiety of the property, where in default of a child, the deceased leaves one or more ascendants in each of the paternal and maternal lines; and three-fourths, where he leaves ascendants but in one line. 916. In default of ascendants and descendants, liberalities by acts of gift or will may exhaust the entirety of the property."

Maine, in "Early Law and Custom," 111, says: "Englishmen are less interested \* \* \* in all succession by law, through their almost universal habit of determining the devolution of their property by marriage settlement or wills. But on the Continent, principally through the operation of the French Code and of the codes modelled on it, the practice of testamentary disposition is said to be on the decline. The rights over the father's property secured to children are indefeasible, and the chief modern object of a will, the distribution of property among children according to their character and needs, being thus unattainable, wills fall into disuse and the law is left to settle the succession of more distant relatives."

The Italian Civil Code reads: "805. Liberalities by will cannot exceed one-half of the goods of the testator, if that one at his decease leaves children, whatever may be the number of said children. The other half is reserved for the benefit of the children and forms their portion.

"807. If the testator has left neither children nor descendants, but ascendants, he can dispose only of two-thirds of his goods. The legal portion, or the third, belongs to the father and to the mother in equal portions. \* \* \* If the testator leaves neither a father nor mother, but ascendants in the paternal and maternal line, the statutory portion belongs one-half to one and one-half to the other.

"808. The *legitime* is a portion of the inheritance; it is due to children, descendants or ascendants in full right, and the testator can burden it with no charge or condition. 809. The testator, who leaves at his decease neither descendants nor ascendants, is able to dispose of his goods by universal or particular title."

"Institutes of the Civil Law of Spain," by Dr. Rio (Johnson's translation), page 117: "With respect to the mode in which a testator may dispose of his property, it is an indisputable principle of the laws of Castile, that if he has children or grandchildren, \* \* \* he must necessarily institute them heirs, and can only dispose in favor of strangers, or other persons, of the remnant of one-fifth of his property. \* \* \* In default of children and grandchildren a testator must devise or bequeath in favor of his father and grandfather, or ascendants, if he should have any, with the exception of the third, of which he can dispose freely. \* \* \* 'All the property of the parents is the lawful portion or right of the children, with the exception of the fifth.'"

"Law of Scotland" (Burton, 105): "If a man dies leaving a widow and children, his moveables are divided into three parts—one goes to the widow, and is called *jus relictæ*; another goes to the children, and is called *legitime*, or bairn's part, and the third is called the dead's part. \* \* \* If (the deceased) leave children and no widow, one-half goes to the children, the other is dead's part. \* \* \* The *jus relictæ* and *legitime* can not be defeated by a testament. \* \* \* The dead part \* \* \* is the only part which can be conveyed by a testament or will." *Vide Burns* "Ecclesiastical Law," 421.

Voorhies' Revised Civil Code of Louisiana (1889) reads: "Art. 1493. Donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number. Under the name children are included descendants of whatever degree they be. \* \* \* Art. 1494. Donations \* \* \* cannot exceed two-thirds of the property (if the testator) \* \* \* leaving no children, leave a father, mother or both." Donations "may be made to the whole amount of the property" if deceased leaves neither descendants nor father or mother.

The Austrian Civil Code (Winiwarter) declares, "Sec. 762: The persons whom the testator is obliged to favor in his last disposition with a part of the inheritance, are his children; and in case of there being none, his parents. 765. The law allots to each child, as his legitimate portion, the half of what he would have obtained according to the legal succession. 766. Each legitimate heir in the ascending line, can as his legitimate portion, claim the third part of what he would have obtained according to the legal succession. 732. If the testator has legitimate children of the first degree, the whole inheritance falls to them (in case of intestacy)."

In Sweden, "if he leave issue, nor can he dispose of more than one moiety of the estate, the other moiety belonging by law to the issue as their *pars legitima*" (Jarman, "Wills," II., 784), and

In Norway, he "can only dispose of one-fourth of his property to the detriment of such issue."



Blackstone's "Commentaries," II. 491, recites: "We are not to imagine that this power of bequeathing extended originally to all a man's personal property. On the contrary, Glanvil will inform us that by the common law as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, of which one went to his heirs; another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children. \* \* \* If he died without either wife or issue, the whole was at his own disposal.

"This continued to be the law of the land at the time of *Magna Carta*, and in the reign of King Edward III. this right of the wife and children was still held to be the universal or common law; \* \* \* and Sir Henry Finch lays it down expressly in the reign of Charles I., to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels, though we cannot trace out when first this alteration began."

The Statute of Wills (I. Victoria 26, 1837), enacts: Section 3, the general enabling clause, provides, "And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will, executed, etc., all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death."

The law of testamentary disposition in the United States with respect to children is stated by Chancellor Kent as follows: "The remaining branch of parental duty consists in making competent provision, according to the circumstances and conditions of the father, for the future welfare and settlement of the child; but this duty is not susceptible of municipal regulations, and it is usually left to the dictates of reason and natural affection. Our laws have not interfered on this point, and have left every man to dispose of his property as he pleases, and to point out in his discretion the path his children ought to pursue. The writers on general law allow that parents may dispose of their property as they please, after providing for the necessary maintenance of their infant children and those adults who are not of ability to provide for themselves. A father may, at his death, devise all his estate to strangers, and leave his children upon the parish; and the public can have no remedy by way of indemnity

against the executor. 'I am surprised,' said Lord Alvarlay, 'that this should be the law of any country, but I am afraid it is the law of England.' "

Having traced the limitation of testamentary disposition in several countries with regard to legitimate children, the consideration of natural offspring will now occupy our attention.

#### NATURAL CHILDREN.

The French Code declares (Sec. 757): "The right of the natural child in the property of his father or mother deceased is regulated in manner following: Where the father or the mother has left legitimate descendants, this right is to one-third of the hereditary portion which such natural child would have had, if he had been legitimate; it is to one-half where the father or mother have no descendants, but yet ascendants or brothers or sisters; it is to three-fourths where the father or mother leave neither ascendants nor descendants, nor brother nor sisters.

"758. The natural child has a right to the whole of the property, where his father or mother leave no kindred of a degree capable of succeeding.

"759. In case of the predecease of a natural child, his children or descendants may claim the rights defined by the preceding articles."

The Italian Civil Code reads, 815: "When the testator leaves children or descendants legitimate, and natural children legally acknowledged, these have rights to a moiety of the part which would belong to them if legitimate.

"816. When there are neither legitimate descendants nor ascendants, the natural children have right to two-thirds of the part which would belong to them if they were legitimate.

"817. Legitimate descendants of a natural child predeceased can reclaim the rights established to their advantage in the preceding articles."

The Code of Louisiana declares: "Art. 917. When the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, the law calls to the inheritance either the surviving husband or wife, or his or her natural children, or the State.

"Art. 1486. When the natural father has not left legitimate children or descendants, the natural child or children acknowl-

edged by him may receive from him, by donation *inter vivos* or *mortis causa* to the amount of the following proportions, to wit:

"One-fourth of his property, if he leaves legitimate ascendants or legitimate brothers or sisters or descendants from such brothers and sisters; one-third, if he leaves only more remote collateral relations."

Our last conclusion of the influence of the Eighteenth Novel is the limitation of testamentary disposition in Holland, France, Italy, Spain, Louisiana, Austria, Sweden and Norway, in the whole estate, and in Scotland and England before the Conquest in personalty only, in favor of legitimate descendants to a certain portion thereof; in default of such in France, Italy, Spain, ascendants receive a certain portion of the patrimony, and in Louisiana and Austria, the immediate ascendants—the father and mother. And in France, Italy and Louisiana, on failure of legitimate descendants and ascendants as aforesaid, the natural children receive a certain portion of the testator's property.

#### SUMMARY:

The Eighteenth Novel of Justinian has been the fountain head of intestate cognatic succession, determining the degrees of descendants and ascendants in modern systems of law.

The principle of intestate cognatic succession has produced individual ownership and contract; accelerated the conception of individual ownership, and produced legal equality.

The limitation of testamentary disposition in favor of legitimate children by increasing their portion has determined succession by necessity in favor of legitimate children in many modern systems of law, and has been extended in France, Italy and Louisiana, as aforesaid to natural children and ascendants.

The Past glories in the Roman Empire, whose laws ruled the civilized world. The Present claims the Church of Rome, still ruling over many nations of the Earth, as a survival of the Empire. The private law of Rome also is a living institution as incorporated in modern systems of law, and the *jus civile* now serves as the foundation for public and private international law.

*Robert C. Fergus.*

## BLUE LAWS OF NEW HAVEN.

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The Supreme Court of Connecticut has, within the last year, filed an opinion in regard to Sunday laws which would have startled the early Legislators of New Haven. The case is *State v. Miller*, 68 Conn. 373. Charles H. Miller (known to some students of Yale) was prosecuted for keeping open on Sunday, at Savin Rock, a billiard room, and demurred. The demurrer was reserved for the Supreme Court of Errors. The court say: "The prohibition on Sunday of any sport or recreation which interferes with the preservation of public peace and order or the enjoyment of appropriate quiet and religious observances on that day, is clearly within the power of the Legislature. If, however, the language used [in the statute] must be construed as including an exercise of the power employed prior to the adoption of the Constitution, to control private action of individuals in a matter of personal conscience, serious questions would arise."

The question thus raised would render it extremely doubtful whether the Sunday legislation of this State, as it has existed for the past seventy-five years, could be upheld in its entirety.

It may be interesting to recall the change which two hundred and fifty years have brought about, and this change will be especially noticeable if we compare the spirit of this decision with the former "Blue Laws" of New Haven.

Blue laws are generally spoken of as the laws of the New England Colonies, especially those enforcing Sabbath keeping and other religious observances. The term "Blue Laws," however, in its proper application as fixed by the use of a hundred years, is applicable only to the regulations of the Colony of New Haven, and especially to those of the Town of New Haven soon after its first settlement.

Webster's Unabridged Dictionary defines "Blue laws" as follows: "A name first used in the eighteenth century to describe certain supposititious laws of extreme rigor reported to have been enacted in New Haven; hence any puritanical laws."

Johnson's Universal Encyclopædia defines "Blue laws" to be "A name applied to certain enactments said to have been made

by the Legislature of the Colony of New Haven, now a part of Connecticut. These laws are said to have interfered seriously with the private life, religious conduct and even the dress of citizens; but, while it is true that not only in New Haven, but in other parts of New England, there was undue influence in these affairs, it is equally certain that many of the blue laws of which certain writers have told us never had any existence in any statute book."

The American Encyclopædia defines "Blue laws" as "A term sometimes applied to the early enactments of several of the New England States, and more frequently limited to the laws of New Haven Colony. \* \* \* The existence of such a code of blue laws is fully disproved. The only authority in its favor is Peters who is notoriously untrustworthy."

The Century Dictionary says: "The assertion by some writers of the existence of the blue laws has no other basis than the adoption by the first authorities of New Haven Colony of the Scripture as their code of law and government, and their strict application of Mosaic principles."

The American Supplement to the Encyclopædia Britannica says that the term "Blue laws" became fixed in its present meaning by the publication of "A General History of Connecticut, from its first Settlement under George Fenwick to its latest period of amity with Great Britain prior to the Revolution. By a Gentleman of the Province, London, 1781." And it adds that the author was the Rev. Samuel Peters.

Peters affirms that the term "blue laws" was applied to the laws of New Haven by the people of Boston and Hartford. He says: "The law givers soon discovered that the precepts in the Old and New Testaments were insufficient to support them in their arbitrary and bloody undertakings; they, therefore, gave themselves up to their own inventions in making others, wherein, in some instances, they betrayed such an extreme degree of wanton cruelty and oppression, that even the rigid fanatics of Boston and the mad zealots of Hartford, put to the blush, christened them the Blue Laws; and the former held a day of thanksgiving because God, in his good providence, had stationed Eaton and Davenport so far from them" (Peters' History, p. 43).

New Haven seems to have exceeded all its neighbors in religious zeal. This was especially notable in its allowing no one to vote who was not a member of an orthodox church; its having the courage of its convictions in applying the strictest pre-

cepts and penalties of the Mosaic law in its legislation, especially to the keeping of the Sabbath; the thoroughness of the enforcement of the laws of the Pentateuch; its refusal of the privilege of trial by jury; its failure to recognize any other earthly power or authority, and its denial of any right of appeal.

Massachusetts Colony by statute restricted the franchise to church members, but this provision was not part of its constitution.

The government of the Town of New Haven was established under the advice and direction of Rev. John Davenport, and no higher power than itself except God was acknowledged or mentioned.

The entire independence of the town of any other government appears from the first. In settling its form of government no mention is made of King, Parliament or any other authority. The Rev. Mr. Davenport explained to them that they were "met for the establishment of such civil order as might be most pleasing unto God, and for the choosing the fittest men for foundation work of a church to be gathered."

Upon his suggestion, the planters unanimously agreed that "The Scriptures do hold forth a perfect rule for the direction and government of all men and all duties which they are to perform to God and men, as well in the government of families and commonwealth as in the matters of the church." They further voted unanimously that "In all matters which concern civil order, as choice of magistrates and officers, making and repealing of laws," etc., they would "all be ordered by those rules which the Scripture holds forth."

Mr. Davenport further informed them that they "were free to cast themselves into that mould and form of commonwealth which appeareth best for them in reference to the securing of pure and peaceful enjoyment of Christ and his ordinances in the church according to God."

The question next arose whether any but church members should vote or hold office, and they unanimously agreed to an affirmative answer.

After the vote was taken one man, supposed to be the Rev. Samuel Eaton, filed a dissenting opinion in which he asserted that magistrates should be men fearing God; that the church is the company whence such men may ordinarily be expected; and that they that choose them ought to be men fearing God; only he held that "free planters ought not to give the power out of their hands so far that they could not resume it if things were

not orderly carried." But the planters unanimously agreed that "Church members only shall be free burgesses, and that they only shall choose magistrates and officers among themselves"; and they made a Fundamental Agreement in which it was stated that "Church members only shall be free burgesses and they only shall choose among themselves magistrates and officers to have the power to transact all public civil affairs of this plantation, of making and repealing laws, &c." And they provided that no one should be received as a planter into the plantation until he should subscribe this fundamental agreement, thus settling the supremacy of the church on a solid foundation.

When other towns afterward united with New Haven in forming New Haven Colony, such as Guilford, Branford, Milford, Stamford and others, there were some objections to the rule that only church members should vote; and in Milford especially there were some who had already voted who were not church members, and whom Milford desired to have retain the franchise, but the point was yielded.

In the first code of laws established by New Haven Colony it was provided, "That none shall be admitted freemen or free burgesses within this jurisdiction, or any part of it, but such planters as are members of some one or the other of the approved churches of New England; nor shall any such be chosen to the magistracy, or to carry on any part of the civil judicature, or as deputies or assistants to have power, or vote in establishing laws, or in making or repealing orders, or to any chief military office or trust; nor shall any others but such church members have any vote in such elections."

In establishing the General Court for the Colony, which both made and administered the laws, this constitution provides that, "This court thus formed shall first with all care and diligence from time to time provide for the maintenance of the *purity of religion* and *suppress the contrary* according to their best light and direction from the word of God."

This duty the court proceeded vigorously to perform, and in the record of each important conviction and sentence duly appears a reference to the Scripture rule upon which it is founded. Afterward, a written code of laws was adopted, founded, however, as were those of Hartford and Massachusetts, on the Scripture and especially on the laws of Moses.

There may have been at the time of the first establishment of a court—October 25, 1639, five hundred persons in New

Haven. In an ordinary country town of that size now, two criminal and two civil trials before a Justice of the Peace would often make an average court docket. A sketch of the business of the court during the first two years from its establishment may give some idea of the thoroughness of the enforcement of law.

The community consisted for the most part of planters with their families and servants. In seating the meeting house, the grades of honor recognized are Governor, Deputy Governor, Mr., Goodman, and plain William Jenkins, with no additional title. The severity of the court was principally exercised against the servants, although there is nothing to indicate that a planter would have received any favor if brought before it for cause, and in some cases a Goodman appears as the culprit.

The day after the establishment of the court an Indian was whipped for attempting to escape; two days after another Indian was condemned to death and the next day was beheaded and his head placed upon a pole in the market place. This was the 29th of October, 1639. The court usually sat once a month. November 3d a theft case was adjourned. December 4th two servants who had stolen five pounds seventeen shillings from their master's chest on the Lord's day in meeting time were whipped and ordered to make double restitution. At the present time they would have used the money to secure their bondsmen and failed to appear. The complainant would have had to bear the loss and the State would have taken the profit. The blue laws were better.

The same day another servant, having been drunk and saucy, and having been whipped for it by his master, was set in the stocks; and another servant, for drunkenness and abuse of his master, was whipped.

February 5, 1640, a debtor not being in funds, was ordered to pay five shillings a week until the debt was paid. Another judgment in a factorizing process was rendered, and still another judgment for simple debt, and another judgment in an action on a case for damage by hogs. Isaiah, Captain Turner's man, was fined five shillings for being drunk on the Lord's day; another was set in the stocks for Sabbath breaking and stealing his master's wine; a boy was whipped for stealing; a man whipped for drunkenness, and there was an acquittal on a charge of drunkenness and a suspension of judgment on another charge, all different men.

February 18th, Goodman Love was whipped and banished—being disorderly himself and encouraging others to disorderly



meetings. George Spencer being profane and disorderly and getting up conspiracy to carry away small boat, was whipped and banished. Three others were whipped and two of them ordered to wear irons.

March 5th, one man freed from his chains; two others to wear them a week longer.

April 3d, four men fined for felling trees without leave, one for building a cellar and selling without leave, and a judgment for debt.

June 3d, Edward Bannister, for contempt of court, and therein the ordinance of God, fined twenty shillings; another, for slander, whipped and banished, being also a pestilent fellow and a corrupter of others.

June 11th, legal prices fixed on all kinds of building materials, different kinds of day's works and many other things: laborers not to take more than two shillings a day in summer or above eighteen pence in winter.

July 1st, one man fined for neglect of watch; three men whipped; a case of scoffing at religion, not sufficiently proved, dismissed with admonition and caution; and a charge of false measure in line adjourned.

August 5th, two men fined for neglect in warning the watch.

September 2d, three judgments for debt and another case referred to arbitrators, and a fine for neglecting the watch. (The business of the watch was to keep a lookout for attacks from Indians.)

October 6, four men fined for neglect of watch; one man fined for drinking wine to excess; two men fined for affronting the court.

October 23, division of land; two deacons take their choice of location, as near as may be to the town that they may the better attend their office.

November 4, Arthur Halbridge, for failing to furnish full measure of lime, is ordered to pay two-fold for all that is charged to be lacking, and from henceforth to take no work by great nor burn any lime to sell.

December 2d, Thomas Franckland, for drinking strong liquors to excess, having drinking meetings in his cellar, and contempt of court, was whipped, fined twenty shillings, and deprived of his cellar and lot, but allowed to occupy the lot and stay on the plantation during good behavior. The same day Andrew Low, Jr., was whipped for stealing and Sabbath breaking; another ordered to be whipped for stubborn carriage to

his master, and execution of sentence suspended during good behavior; and a master ordered to forfeit two months of a servant's time for striking him on the head with a hammer.

January 6, 1841, in a case of a rope loaned by Crane to Thompson and lost by Cogswell, ordered that Thompson make it good to Crane and Cogswell satisfy Crane.

April 7th, John Reader was fined forty shillings for exacting greater wages for twenty days' work than the legal price; a man fined for neglect of watch, and a servant girl, having falsely accused a man of stealing some cloth, was adjudged to pay him twice the value, "according to the law of God in that case."

May 3d, another careful adjusting of prices. Mowing well done, salt marsh, not above three shillings six pence an acre; fresh, by the acre, not above three shillings. Diet for a laboring man with lodging and washing, four shillings six pence by the week.

It was clearly the opinion of the forefathers of New Haven that low prices for goods and labor were beneficial to the community, and laws on this subject were all in that direction.

July 5th, judgment in a civil suit and fine for neglect of watch.

August 4th, a servant for slandering his mistress adjudged to tender her suitable satisfaction; judgment for debt in two cases; Andrew Low, Jr., again ordered to wear a lock.

September 7th, judgment in civil suit.

In the third year of the court a man was put to death upon the authority of and in the manner specified by Leviticus 24:15, without trial by jury and with no pretense of any other statute. In the fourth year several women and girls were whipped, one of them for theft.

No statutes, proper, had as yet been passed in general criminal matters. The orders were mostly in regard to the price of goods and labor and forbidding or allowing of sale of property, etc. The government was a paternal one. For rules of conduct and authority to punish, the court relied upon the Scriptures and the precepts of morality. From the sentence of the court there was no appeal.

If the Judges of the Superior Court of New Haven were bound by no fixed code of laws, and there was no appeal from their decisions, they would occupy very much the same place and have the same power as the first court of New Haven. Altogether, the discipline seems to have been thorough but just.

The double restitution in case of theft or fraud to be paid to the sufferer, and not to the State, was certainly more just and more honest than the present practice, and the whipping which was always additional was after the custom of the time. They had no jail. Their judges were able and just men. The description of ancient New Haven injustice contained in a historial novel recently written by a New Haven man is a travesty worse than that of Peters and more inexcusable.

The excess of rigor of the New Haven code above that of the other New England Colonies was probably more in the enforcement than in the letter, although New Haven Colony exceeded the others in making open and wilful Sabbath breaking punishable with death.

The Sabbath laws of New Haven according to Peters were as follows:

"No one shall run on the Sabbath day, or walk in the garden or elsewhere, except reverently to and from meeting.

"No one shall travel, cook victuals, make beds, sweep house, cut hair or shave, on the Sabbath day.

"No woman shall kiss her child on the Sabbath day or fasting day.

"The Sabbath shall begin at sunset on Saturday."

These and the other blue laws of Peters are a forcible illustration of the old adage as to falsity and truth. They have been solemnly published as veritable statute laws of New Haven in newspapers and periodicals from Peters' day to the present. They have been so published in the City of New Haven within five years. Peters wrote them as a satire. He says they were never printed. He has often been accused of forgery, but it would be as just to accuse Artemus Ward or Major Jack Downing of that crime.

They are partly true. Sabbath began at sunset on the previous day in accordance with the Mosaic law; and running or walking, except to and from meeting, traveling and cutting hair, were doubtless forbidden.

The Sabbath law actually passed in New Haven Colony, as appears from an edition printed in 1656, was as follows:

"Whosoever shall profane the Lord's day, or any part of it, either by sinful servile work, or by unlawful sport, recreation, or otherwise, whether wilfully or in a careless neglect, shall be duly punished by fine, imprisonment, or corporally, according to the nature and measure of the sin and offense. But if the court upon examination, by clear and satisfying evidence, find

that the sin was proudly, presumptuously, and with a high hand, committed against the known command and authority of the blessed God, such person therein despising and reproaching the Lord, shall be put to death, that all others may fear and shun such provoking rebellious courses; Numb. 15:30-36 verses."

A careful search of the capitol laws passed in Hartford in 1642 and of the Complete Code adopted in 1650 fails to disclose any reference whatever to the Sabbath or Lord's day.

The founders of New Haven found no warrant in Scripture for trial by jury, and no jury trials were had there for the first quarter of a century. They strenuously resisted union with Hartford, as thereby those not church members would obtain a vote and a voice in the government, but were at last forced to submit. And in 1665, upon union with Hartford, Sabbath breaking ceased to be punishable with death, and a court with a jury was held in New Haven.

There has been no opportunity for a trial of a case of ordinary Sabbath breaking by a jury, however, in this State until 1895, when the General Assembly for the first time allowed appeals in cases of Sabbath breaking, profane swearing and drunkenness; but the charter of New Haven has protected it from this innovation, and to this day the people of New Haven hold their ancient privilege of having Sabbath breakers condemned without trial by jury.

So far as the blue laws enforced a rigid observance of the Sabbath upon Scriptural grounds, their essential spirit was embodied in the legislation of Connecticut after the union of the colonies, but it has grown feebler, and at last has passed away. Until within eighty years the statutes of this State have provided that no person "shall go from his or her place of abode on the Lord's day unless to attend upon the public worship of God unless upon works of necessity or mercy, on penalty of eighty-four cents." Also, that "All and every person and persons in this State shall and they are hereby required, on the Lord's day, carefully to apply themselves to duties of religion and piety, publicly and privately." Also that absence from public worship should be punishable by a fine of fifty cents; any one accused to be deemed guilty unless he or she prove to the satisfaction of the justice that he or she had attended worship; that any one fined for profanation of the Lord's day, and failing to pay the fine, should be whipped; that no appeal in cases of Sabbath breaking should be allowed.

Until the first of August of this year, all recreation whatso-

ever upon the Sabbath day, which would include walking, driving, bicycling, etc., has been forbidden by law; thus holding fast, in letter, to the ancient prohibition of the laws of New Haven.

But the triumph of Hartford would seem to be at last complete, and the General Assembly of the present year, at the instance of a committee of Congregational churches, and in pursuance of the opinion above cited, written by a Hartford judge, has repealed the penalty against recreations which are not sports. All sports and all labor other than works of necessity or mercy are still prohibited.

It should be noted, however, that every elector of the State is sworn to support the Constitution of 1818, which still declares it to be the "duty of all men to worship the Supreme Being, the great Creator and Preserver of the universe." And for a quarter of a century after the adoption of this Constitution, and until within fifty years, the statutes of our State contained the enactment that, "It shall be the duty of citizens of this State to attend public worship of God on the Lord's day."

Contracts made on Sunday between the rising and the setting of the sun were wholly void, and money loaned on Sunday could not be recovered and property delivered on Sunday need not be paid for, until 1889 (*Finn v. Donahue*, 35 Conn. 216; *Cameron v. Peck*, 37 Conn. 555), when the General Assembly encroached on the rigor of the old law in this respect by enacting that "No person who receives a valuable consideration for a contract expressed or implied by him on Sunday, shall defend any action upon such contract on the ground that it was so made, until he restores such consideration." And in 1895 it was held in *Horton v. Norwalk Tramway Company*, 66 Conn. 272, that a passenger might recover against a street railway company for negligence resulting in injury to him while riding for pleasure on Sunday, although the opinion admits that the term "recreation" as prohibited by Section 1569 may be used in a sense which would include taking a ride for pleasure in a street car.

The General Assembly of this year in abolishing the prohibition of recreation and increasing the penalty against labor and sports has emphatically declared that Sunday laws are to be respected.

There is no space in this article to consider the legislation or decisions of other States. Taken as a whole, they are nearly all coming to the conclusion which Connecticut has nearly reached,

and which is sustained by the general approval of the people as well as of the courts, and which is briefly stated in *State v. Miller, supra.*

The ends now sought in Sunday legislation are substantially these: Sunday to be observed and protected as a day of rest for the whole people, and so that those who are subject to the control of others shall not be obliged to work. Works of necessity will include those necessary for the health and comfort of the people. To these, there is a continual attempt to add those necessary for the reasonable enjoyment of the day after the individual preference of each. The mass of the people recognize Sunday as a day of religious worship and their feelings would be shocked, and the value of the day as a day of rest diminished, if sports as such were allowed to be generally carried on; and legislatures and courts are, thus far, practically agreed upon the prohibition of sports.

The enforcement of a Sabbath law as founded upon Scripture, and as a carrying out of a command of God to keep holy the day, has practically ceased, and *State v. Miller* has written its epitaph; nevertheless, our forefathers of New Haven acted as they believed, and the "blue laws" of New Haven, rightly understood, will always be a monument to the earnestness, the sincerity and the religious zeal of New Haven's founders.

*Henry G. Newton.*

NEW HAVEN, November 1.

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CONCERNING no subject will the efforts of the American Bar Association to secure uniform legislation be more greatly appreciated than in regard to that of divorce. Generally, the *raison d'être* of uniformity in legislation is the business interests of the different States, but, in the case of divorce something more than the commercial welfare of the country is at stake. It is on grounds of common morality as well as of expediency, that the granting of divorces ought, of all things, to be governed by uniform laws; and the legislation recommended by the uniform-law commission of the American Bar Association should be adopted by every State whose laws are not equally adapted to the necessity for stringent and efficient rules.

It is scandalous that such diversity of legislation should be permitted to control the annulment of so sacred a contract as that of marriage. Relative to their importance, other contracts are governed by much more rigid rules; but, however rigid the laws of Massachusetts, the persistent seeker of divorce may feel sure of obtaining his object by an appeal to the courts of Oklahoma. Thus laxity of law in one State renders ineffectual the laws of all other States.

Not only with regard to the immediate parties in divorce proceedings is the present lack of uniformity a disgrace, but also for the numerous following of unscrupulous lawyers whom it furnishes with employment. Laxity of the law here opens the door to all kinds of trickery and encourages practices that are a discredit to the profession, while aiding unprincipled men and women in what is no less than bigamy.

THE important provisions of the legislation recommended by the American Bar Association are that all applications for divorce must be by bill or petition; that the plaintiff must have resided in the State two years before beginning the action; that the defendant must be personally served in the action, unless it shall appear that the defendant cannot be found, in which case notice may be given by publication; that each divorce case shall be heard in open court, and in no case of default shall a divorce be granted, unless the judge is satisfied that all proper means have been taken to notify the defendant and unless the cause of divorce has been fully proved by reliable witnesses. Another provision is for the punishment of any person who shall advertise in any way to secure or assist in securing a divorce.

The practices at which these provisions are aimed will suggest themselves; the necessity for the consideration of the proposed legislation by those States which are the offenders is equally obvious.

\* \* \*

FAITH in expert testimony has recently been much shaken by the outcome of the Luetgert trial in Chicago. In this criminal inquiry, as in that of Marie Barbeeri in New York, have been demonstrated the dangerous possibilities of the miscarriage of justice arising from the American system under which expert opinion is permitted to be introduced in the courts.

Scientists are not infallible and it would be unreasonable to expect them always to agree, but, where each side in a criminal cause may employ, if it can, scientific opinion to support its view, and where an inquiry is reduced practically to a debate between hired experts, there is considerable opportunity for perjury, and disagreement of the experts is likely to result with consequent clouding of the issue and perplexity of the jury.

Whether they do things better in France and Germany, where the introduction of expert evidence is under different rules, we are not prepared to say; we speak only of the frequent failure of our own system. In these foreign countries expert testimony is confined to a permanent commission appointed by the Government, paid by the year, called on by the judge, and making their report independent of either side. The advantages of such a system are that the expert opinion is more likely to be scientific, impersonal and impartial. For the Government to choose and pay all the experts rather than to have them in the employ of the interested parties seems more likely to result in justice, though, on the other hand, doubt has been expressed



whether the introduction of the Continental system would not trench upon the "rights and liberties of the individual to meet a public indictment." However we may differ as to the remedy, the need of a remedy remains; it is plain that the present system results too often in a clear obstruction of justice.

\* \* \*

ELECTION to the board of editors of the JOURNAL will this year be decided largely on the basis of a thesis competition, the decision being governed somewhat also by the quality of the class-room work of the competitors. The thesis subjects which follow have been chosen with a view to the presumable qualifications of the average members of the Junior and Middle classes, and the editors hope that many members of both classes may be interested in entering the competition. The subjects are:

"The demerits of the Olney-Pauncefote Arbitration Treaty."

"In what light can stock certificates be deemed quasi-negotiable?"

"Can the American official law reports be advantageously noticed in bulk?"

"Should the ordinary course in American colleges for the degree of B.A. be shortened to three years?"

"The influence of the Penn charter on the institutions of Pennsylvania, now existing."

"The one man power in modern city charters."

Any one of the above subjects may be selected. The theses should be about four thousand words in length, and should be handed in on or before March first, 1898, being marked with an assumed name or device, and the true name of the author being enclosed in a sealed envelope marked with such assumed name or device. To the author of the most meritorious thesis a prize of twenty-five dollars (\$25) will be awarded.

## COMMENT.

Since the suggestion of Justice Story in the Dartmouth College case the States, in granting special charters of incorporation, have very generally reserved the right to alter and amend or have asserted it in their general laws of incorporation. But such a doctrine is utterly destructive of all property rights. Hence the more conservative view has been generally adopted that in this respect the States are left in the situation in which they were before the Dartmouth College case, before it was decided that private charters are contracts within the Constitutional provision against their impairment. But for this Constitutional provision the power of the State to amend would exist with no reservation in the charter. Hence the question is now whether such an amendment or alteration by the State is within the reservation or not. If it is, the further question as to impairment of the charter contract must be decided; but if not, no such question arises, as for this reason alone the amendment must fail.

The last legislature of Indiana enacted as an amendment to the general law for the incorporation of street railways (a section of the law expressly reserving this right of amendment) that in cities having a population of 100,000 or more, according to the U. S. census of 1890, the cash fare should not exceed three cents for each trip. Another section gave the directors power to make by-laws regulating the fare on their roads. In passing on the validity of this amendment the Supreme Court of Indiana and the U. S. Circuit Court came to directly opposite conclusions. In *City of Indianapolis v. Navin*, 47 N. E. Rep. 525, the former upheld its validity solely under the general police power of the State as to regulation of rates, which power they declare would exist even if the right to amend had not been reserved and the exercise of which here does not impair the obligation of any valid contract of either the State or the city. But can this police power be so exercised as to conflict with the provisions of the charter contract? Every amendment must come within the reservation or the charter is violated. And squarely on this point the two courts split. The Indiana Constitution prohibits special laws except in certain specified cases, which do not include this, and in all others where a general law can be made applicable, further providing that corporations other than banking may be formed under general laws. The Indiana court de-

clares that whether a general law can or cannot be made applicable is a question exclusively for the legislature and not reviewable by the courts, and even if this were a local law which they do not decide) it is not special, because it applies alike to all roads now or hereafter operated in that locality. Some weeks later the Circuit Court in *Central Trust Co. v. Citizens' Street Ry. Co.*, 82 Fed. Rep. 1, after justifying its disregard of the decision of the State court as final, on the ground that the controversy concerned a contract whose meaning depended on the construction of a statute, which construction was made after the contract was entered into, held to the contrary. Its argument was that the contract provision in its charter that the directors may fix the rates cannot be altered by the Legislature unless power so to do is reserved by the charter (*Reagan v. Trust Co.*, 154 U. S. 362), and the action of the Legislature must come within this reservation. The Legislature has no general authority under which it can change this corporate power with regard to rates in contravention to the charter contract. The power to regulate rates in distinction to the power to pass laws making for the public health and morals can be contracted away by the States. Further the amendment is special and local, as it applies only to the one city of Indianapolis, and can never apply to any other now or hereafter. Hence the law of incorporation so amended becomes special and contrary to the Constitution.

The latter opinion seems to us to be based upon the sounder reasoning. The Indiana court clears the subject of constitutional objections by placing its decision on the police power of the State. But in the matter of regulating rates the police power cannot be exercised so as to violate any charter or contract previously existing or constitutional provision (2 Mor. Pin. Corp., Sec. 1075). If the amendment had not made the general law of incorporation special, it must have stood.

All persons who have invented or evolved any machine or process of manufacture, whether patentable or not, are entitled to have their property in such invention protected from infringement. When any article is made under such conditions and placed on general sale, the public have a right, by any legitimate means within their power, to ascertain the method of manufacture, and to apply such knowledge to their own benefit. But under such a right an employee of a firm producing such articles may not disclose the knowledge he has acquired in his work, whether he has signed an agreement to refrain from so

doing or not. The case of *O. & W. Thum Co. v. Tloczynski*, 72 N. W. Rep. 140, is of value in drawing the above conclusions. The defendant had been employed in the manufacture, by a secret process, of sticky fly-paper; and, after leaving their employ, expressed his intention of disclosing to others, desirous of entering into competition with the plaintiff, such knowledge of the process involved as he had acquired; whereupon an injunction was asked for. The fact that a person has a right in any secret process, though unpatented, which a court of equity will respect, is well settled by numerous decisions, notably *Peabody v. Norfolk*, 98 Mass. 452. Having such a right he can make and enforce a contract with an employee against the disclosure of any knowledge acquired in such business. One of the best cases where such a contract existed, was that of *Kodak Co. v. Reichenbach*, 79 Hun. 183, 29 N. Y. Supp. 1143, which was cited in *Little v. Gallus*, 38 N. Y. Supp. 487. This latter case was very similar in principle to the one under discussion, there being no express contract. The claim brought forward that such contracts are in restraint of trade is of little importance. It has been repeatedly held that contracts for the exclusive use of a secret art are not in restraint of trade, and hence if one can agree with another to refrain from using a secret process most certainly an employer may so contract with his employee.

A case not reported as yet, but found in the *Albany Law Journal* for October 16, is *In re Arthur L. Weeks*. This case arose upon a demand by a State court upon an Internal Revenue Collector, whose headquarters were in an adjoining State, where certain revenue papers were on public file, for information contained therein. Upon his refusal to disobey the orders of the Treasury and Internal Revenue Departments, forbidding such testimony, he was committed for contempt, and petitioned for a release on *habeas corpus*. On the hearing the petition was granted, and the case was declared similar to *In re Huttman*, 70 Fed. Rep. 699, and distinguished from *In re Hirsch*, reported in 74 Fed. Rep. 928, and commented on in the February number of this JOURNAL. The jurisdiction of the State and Federal courts in *In re Hirsch* was held concurrent, while in the case at bar, upon the principle set forth in *In re Neagle*, 135 U. S. 1, the State court had no control over papers filed in another State. The State, instead of attempting to compel the collector to testify, should have obtained the information necessary from the papers themselves, which were open to public inspection.

## RECENT CASES.

## CORPORATIONS.

*Railroads—Legislative Control—Maximum Rates—Mileage Books.—Smith v. Lake Shore & M. S. Ry. Co.*, 72 N. W. Rep. 328 (Mich.). The Constitution of Michigan (Art. 19 a. § 1) empowers the legislature to pass laws establishing reasonable maximum rates for the transfer of passengers on the railroads of the State. Having established such maximum rate, the legislature further enacted (Pub. Acts 1891, No. 90) that the railroad companies in the State should be required to issue 1000-mile tickets, at a specified rate, lower than the maximum rate. The majority opinion upholding the constitutionality of this latter enactment, cites especially *Wellman v. Ry. Co.*, 83 Mich., at p. 624, to rebut the contention that the section of the constitution (19 a. § 1) is a limitation upon the authority of the legislature, and that the power of fixing rates is exhausted when the maximum rates have been established. See also *In re Thirty-Fourth St. R. Co.*, 102 N. Y. 343. Such subsequent fixing of different rates does not result in unjust discrimination. *Interstate Commerce Commission v. Ball & O. R. Co.*, 145 U. S. 263. Grant and Hooker, J. J., dissent. The affirmative grant of power to fix a maximum rate implies an exclusion of all other powers of this nature. Story Const. § 448. It lies within the police power to protect the general public by fixing a maximum rate which such quasi-public corporations may charge (*Munn v. Illinois*, 94 U. S. 113); but to enforce the issuance of mileage tickets at certain figures on the ground that a quantity of commodity is contracted for, is a plain abuse of the police power, and unjust discrimination in favor of those who have the means and opportunity of purchasing in quantity. It would be anomalous to call this class the "general public." The argument of counsel in this case leads to the conclusion also that the legislature may manage and control the business of the railroads of a State just as fully and completely as it could if the State owned them. The interstate commerce act seems to have been designed to prevent the very thing that this law would require.

*Injunction—Restraining Brokerage in Railway Tickets—Jurisdiction—Amount in Dispute—Principles Governing Remedy—Novel Use of Writ.—Nashville C. & St. L. Ry. Co. v. McConnell et al.*, etc., 82 Fed. Rep. 65. In order to aid in the success of the Tennessee Centennial Exposition at Nashville, its managers induced the leading railroads to issue at one-third the regular rates a special contract round-trip ticket, to be used only during the period of the Exposition, which by its terms was non-transferable, and should become void in the hands of any third party acquiring it in violation of the agreement. Defendants, who were "ticket scalpers" were in the habit of buying and selling the return portions of these tickets, and a bill was brought to restrain them from further prosecuting this particular branch of the brokers' business. *Held*, that plaintiffs are entitled to an injunction to so restrain defendants. The injury sustained by the railroads because of the violation of these contracts is irreparable, for the multitude of suits necessary for redress at law would bring absolutely no substantial result to complainants. See *Wahle v. Reinbach*, 76 Ill. 322; *Parker v. Woolen Co.*, 2 Black 551; *Wylie v. Coxe*, 13 How. 415; *Sanford v. Poe*, 37 U. S. App. 378. The case is not one

for the recovery of damages for the numerous breaches of contract, but protection of the business of complainants from loss suffered and to be suffered by frauds committed and to be committed. The court therefore entertained no doubt of its jurisdiction, as the amount involved is the continuing loss to be prevented from the fraudulent use of these void papers. *Railway Co. v. Kuteiman*, 54 Fed. 552; *Scott v. Donald*, 165 U. S. 107. A close analogy is furnished in trade-mark and patent cases. The "age-worn" objection of novelty is urged against the serving of the writ of injunction in this case also. A similar objection was overruled in *Toledo, A. & N. M. Ry. Co. v. Penn. Co.*, 54 Fed. 751, also in the famous Strike Cases, arising out of the contempt proceedings in *U. S. v. Debs*, 64 Fed. 724. See also *In re Debs*, 158 U. S. 565; *Shoe Co. v. Saxe*, 131 Mo. 212; *Scott v. Donald*, supra; *Arthur v. Oakes*, 63 Fed. 310; *Davis v. Zimmerman*, 36 N. Y. Supp. 303, and *Lumley v. Wagner*, 6 Eng. Ruling Cas. 652.

**Taxation—Exemption.**—*Etna Ins. Co. v. Mayor, etc., of City of New York*, 47 N. E. Rep. 593 (N. Y.). Laws 1886 (N. Y.) whereby certain property of insurance companies is exempted from taxation, held not to apply in that year, the taxes having already been assessed but not actually levied. This is so upon authority of *In re American Fine Arts Society*, 151 N. Y. 621, where the act took effect on May 3d, and the assessment was made on May 1st, but not actually levied. Also in *Assn. for Benefit of Colored Orphans v. Mayor, etc., of New York*, 104 N. Y. 581, the same doctrine is applied where the plaintiff became the owner of the property after May 1st, and before the tax was actually imposed.

**Foreign Corporations—Compliance with Statute.**—*New York Nat. Building & Loan Ass'n, v. Connor*, 41 S. W. 1054 (Tenn.). Prior to the passage of a statute describing the terms upon which a foreign corporation could do business within the State, the defendant became a stockholder in the plaintiff company, a foreign building and loan association, and applied for a loan therein. After the passage of such a statute and before the plaintiff had complied with its terms, the loan was made and a mortgage taken as security. Held, that the mortgage was illegal and unenforceable, even though the borrower may have acquired a vested right to the loan and the association under obligation to make it. The making of the loan and giving the mortgage were not merely the winding up of unfinished business.

**Water Companies—Condition of Furnishing Water.**—*Crumley v. Watauga Water Co.*, 41 S. W. Rep. 1058 (Tenn.). A water company, duly organized and chartered under a general State law and clothed with the power of condemnation, is a quasi-public corporation and must furnish water to all who apply therefor and tender the legal rates. Such a corporation cannot justify its action in refusing to furnish one water on his refusal to pay a due-bill for water furnished a year or two previously. The company had given him its credit by accepting a duebill and could not thereafter coerce payment by denying a present legal right.

**Statutes—Special Acts—Constitutional Law—Legislative Control of Cities.—Restrictions on Use of Property, City of St. Louis v. Dorr, 41 S. W. Rep. 1095 (Mo.). An act of the legislature of Missouri prescribed that "all cities in the state having a population of three hundred thousand or more \* \* \* are hereby authorized to establish boulevards and provide for maintaining the same \* \* \* and may exclude the institution and**

maintenance of any business avocation on the property fronting on said boulevard." Pursuant to this authority the municipal assembly of St. Louis enacted an ordinance establishing certain boulevards and forbade thereon the following of any business avocation whatever. *Held*, that while such act of the legislature was not a special act it was nevertheless in violation of the Constitution, Art. 2 § 30, declaring that no person shall be deprived of property without due process of law. *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. Rep. 861.

*Contributory Negligence—Financial Condition of Parents—Charge to the Jury.*—*Fox v. Oakland Consol. St. Ry.*, 50 Pac. Rep. 25 (Cal.). In an action against a street railway company for negligently causing the death of a child, the judge of the lower court charged the jury as follows: "The fact that plaintiff is a poor man, if that be true, constitutes no ground why he is entitled to a verdict, but is a matter to be considered by you in determining whether or not he has been guilty of contributory negligence." *Held*, erroneous. The courts have held differently in regard to this question, but to quote from *Mayhew v. Burns*, 113 Ind. 339, 340: "Whether one was negligent or not in a given case must be determined by considering his or her conduct as it related to the particular circumstances of the occasion or affair out of which the case arises." In the case at bar, the contention seemed to be that plaintiff's poverty affected his ability to have the child properly cared for.

#### CONTRACTS.

*Implied Contracts—Statute of Frauds—Rescission.*—*Miller v. Roberts*, 47 N. E. Rep. 585 (Mass.). Plaintiff conveyed his farm at the request of the defendant to a third person in consideration of defendant's oral promise to convey to him another farm. Defendant, without plaintiff's consent, sold and conveyed the farm he had agreed to convey to plaintiff to another person, thus making it impossible for him to perform his agreement. *Held*, that defendant was liable for the property conveyed by the plaintiff for his benefit, notwithstanding the agreement by which he received it could not have been enforced by reason of the Statute of Frauds. Where one receives money or property on an executory contract which cannot be enforced by reason of the Statute of Frauds, and he then refuses to perform the contract, he is liable on an implied promise to return the money or pay for the property. *Dix v. Marcy*, 116 Mass. 416; *Root v. Burt*, 118 Mass. 521.

*Delivery—What Constitutes.*—*People's Nat. Bank v. Freeman's Nat. Bank*, 47 N. E. Rep. 588 (Mass.). Where a sealed package of papers was sent to a collector with a draft attached for collection and with instructions to deliver papers only upon payment of draft, a temporary surrender of the package to the drawee for examination was not a "delivery" within the instructions. The delivery contemplated by the letter of instructions was an absolute one, and could be no other than that which was necessary to be made upon payment of the draft, *i.e.*, a surrender of the package to the drawee as his own property.

*Life Insurance—Wager Policy.*—*Givens v. Veeder*, 50 Pac. Rep. 316 (N. M.). A assigns to B a life insurance policy for \$5,000 to secure a debt of \$2,000, and B afterwards pays semi-annual premiums, interest, etc., amounting to \$4,500 at the time of the insured's death. A second creditor, C, to whom A had assigned his title in the insurance policy, which he did not possess because

of previous assignment, brings an action to compel B to pay the debt due to him, C. *Held*, that the unconditional assignment of the policy by A to B did not constitute a "wager policy" or "speculative risk." This is not contrary to *Cammack v. Lewis*, 15 Wallace 643, as in that case the amounts of the debt and the assignment were disproportionate.

*Rights and Liabilities of Co-Sureties.*—*Pile v. McCoy*, 41 S. W. Rep. 1052 (Tenn.). Where one of the sureties of a guardian's bond receives the ward's money from the guardian for his own use, in consequence of which the guardian defaults, he is liable to this co-surety for the entire amount defaulted, especially if he has indemnified himself. This is true although the co-surety may have known and acquiesced in his receiving the money.

#### MINES.

*Mining Claims—Location by Aliens—Subsequent Declaration of Intention.*—*Lone Jack Min. Co. v. Megginson*, 82 Fed. Rep. 89. The declaration of an intention to become a citizen by an alien who has located a mining claim on public lands of the United States, made subsequent to his location of the claim, relates back to the time of such location and validates it, in the absence of intermediate adverse claims. Sec. 2319, Rev. St. declares that the mineral lands belonging to the United States shall be open to "occupation and purchase by citizens of the United States and those who have declared their intention to become such." But it has been held that an alien who locates a mining claim on public lands may hold his interest as against all the world, except the United States. *Billings v. Smelting Co.*, 51 Fed. 338. In *Manuel v. Wulff*, 125 U. S. 505, the conveyance of a claim by a qualified locator to an alien operated to transfer the claim to the grantee, "subject to question in regard to his citizenship by the government only." This case cited with approval the ruling in *re Krogstad*, 4 Land Dec. Dep. Int. 564, in which it was held that an alien having made homestead entry, and subsequently declared his intention to become a citizen, the alienage at time of entry would not, in the absence of an adverse claim, defeat the right of purchase. See also *Gouverneur's Heirs v. Robertson*, 11 Wheat. 332, and *Osterman v. Baldwin*, 6 Wall. 116, and the leading article on Mining Law in this issue of the YALE LAW JOURNAL.

*Mineral Lands—Trespass.*—*Lincoln Lucky Min. Co. v. Hendry*, 50 Pac. Rep. 330 (N. M.). The principle, "*Cujus est solum, hujus est usque ad calum*," applies to land in general, and it cannot be contended that the rule is different when the lands in controversy are mineral in character, and that while a trespasser may have such possession of the surface of the earth as would enable him to maintain ejectment against a subsequent intruder who entered upon the surface and ousted him, yet that such possession may be insufficient to enable him to maintain ejectment against the same intruder if he enter beneath the surface upon a vein of mineral—and this without reference to the mining laws.

#### EVIDENCE.

*Newly Discovered Evidence—Discovery of Lost Writing.*—*Mercer v. King*, 42 S. W. Rep. 106 (Ky.). The finding of a lost writing after an action thereon, in which it was attempted to be proved by secondary evidence and there was a conflict of testimony as to some of its provisions, will entitle the unsuccessful party to a new trial on the ground of newly discovered evidence.



*Homicide—Evidence—Testimony on Former Trial.*—*State v. Smith*, 73 N. W. Rep. 279 (Ia.). After the shooting of S., one T. was accused of the crime, and had a preliminary examination before a justice of the peace, at which S. testified for the State, and identified a person other than his own wife as his assailant. In an action against the wife for the subsequent murder of S., it was competent for her to bring in against the State the testimony of S. at the examination of T. Although present defendant was not a party to the proceedings in which the testimony of her husband was given, yet S. was a witness for present plaintiff, and the admissibility of the testimony of a deceased witness depends in a large measure upon the right which the person against whom it is sought to be used had to appear in the proceeding in which it was given and cross-examine the witness. *Harrison v. Charlton*, 42 Ia. 574; 1 Greenl. Ev. § 164.

*Witnesses—Impeachment.*—*State v. Slack*, 38 Atl. Rep. 311 (Vt.). *Held*, that in criminal cases a State may impeach its own witnesses. The public, in whose interest crimes are prosecuted, are as much concerned that the innocent should be acquitted as that the guilty should be convicted. Thus it is the duty of the State to produce and use all witnesses within reach of process, whose testimony will throw light upon the transaction under investigation, and aid the jury in arriving at the truth, whether it makes for or against the accused. *State v. Magoon*, 50 Vt. 333; *State v. Harrison*, 66 Vt. 523, 29 Art. 803. Cf. also case preceding.

#### MISCELLANEOUS.

*Interstate Commerce—Original Package—Liquors.*—*Guckenheimer et al. v. Sellers*, 81 Fed. Rep. 997 (S. C.). An original package, within the meaning of the Interstate Commerce Act, is an unbroken package in precisely the same condition and shape in which it was delivered to the transportation company for carriage, whether bottle, box, barrel or crate. The barrels and boxes, and not the bottles are the original packages, even where the bottles are separately wrapped and marked "original package," but put in barrels and boxes and shipped (*Keith v. State*, 91 Ala. 2). But a single bottle, however small, if packed separately and shipped singly, may be an original package and will receive the protection of the courts (*In re Beine*, 42 Fed. 546). This latter case is at variance with *Com. v. Paul*, 170 Pa. St. 284, and *Com. v. Schallenberger*, 156 Pa. St. 201, but is considered the better law.

*Riparian Rights—Navigable Waters—Trespass—Rights of Hunters.*—*Hall v. Alford*, 72 N. W. Rep. 137 (Mich.). In an action for trespass for shooting ducks by means of decoys near an island and within the channel of the river the court *held* that the defendant had the right to use the waters for the purpose of a public highway, but that he had no right to interfere with the plaintiff's use thereof for hunting, which belonged to him as riparian owner. As the defendant was not using the waters for the purpose of navigation and as the rights of the riparian owner are subject only to the public use for the purpose of navigation (*Browning Co. v. Jarvis*, 30 Mich. 308), the actions of the defendant constituted a trespass. *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. Rep. 845.

*Grand Juries—Secrecy of Proceedings.*—*State v. Bowman*, 38 Atl. Rep. 331 (Me.). *Held*, that an indictment is invalidated by the presence of an official stenographer during the testimony of witnesses before a grand jury.

notwithstanding he was not present at its deliberations. The investigations and deliberations of a grand jury should be in secret, in order to secure the utmost freedom of deliberation, expression of opinion and action among the members. Hence the oath established by common-law usage: "The State's counsel, your fellows' and your own you shall keep secret." The injunction applies as well to secrets of the State, the persons accused and the witnesses who testify to facts brought out during the examination. This, however, is contrary to *U. S. v. Simmons*, 46 Fed. 65. See also *Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335.

*Wills—Validity—Provision.*—*Cruger v. Phelps*, 47 N. Y. Supp. 61. A condition in the will of an American citizen residing abroad, by which testator's daughter forfeits her right to the income of the residuary estate, in case she resides or travels outside the continent of Europe, which condition is expressly limited to the life-time of the husband, or "until she shall be divorced from him *a vinculo matrimonii*, and remain so divorced from him," is a direct inducement to the daughter to procure such divorce, and is void as against public policy and good morals. *White v. Snyder*, 8 N. Y. Supp. 119; *Potter v. McAlpine*, 3 Dem. Sen. 108.

*Contempt—What Constitutes—Newspaper Articles—Reflections on Judge.*—*State ex rel. Attorney General v. Circuit Court of Eau Claire County et al.*, 72 N. W. Rep. 193 (Wis.). Articles written by a lawyer and charging a judge of the circuit court, who was a candidate for re-election with dishonesty and partiality in the trial of cases already disposed of were published in a newspaper which opposed the judge's candidacy for re-election. These articles were widely circulated and delivered by various parties to the officers and jurors of the court over which the judge presided while it was in session. The judge instituted proceedings against the author and publisher and was about to have them committed for contempt. During these proceedings an affidavit was filed alleging the truth of the articles, which affidavit was claimed by the judge to constitute a new and independent contempt, committed in the actual presence of the court. In an action on a writ of prohibition to restrain the judge from carrying out his threat of commitment, *held*, that neither the original articles nor the affidavit constituted a contempt, either at common law, or under the State statute (Rev. St. § 2565). If any contempt was committed it is what is known as a constructive contempt, and the cases cited to support the contention that the present is such contempt, do so upon the principle that libelous publications have a tendency to prejudice the course of justice in the particular case then pending. *Sturoc's Case*, 48 N. H. 428; *State v. Frew*, 24 W. Va. 416; *People v. Wilson*, 64 Ill. 195; *In re Cheeseman* (N. J. Supp.), 6 Atl. 513. But several cases hold directly that such articles, even when referring to acts of court in actions already ended, constitute contempt. *State v. Morrill*, 16 Ark. 384; *Dandridge's Case*, 2 Va. Cas. 409; *In re Chadwick* (Mich.), 67 N. W. 1071. In England the mere writing contemptuously of a superior court or judge has been declared a constructive contempt at common law, 4 Bl. Comm. 285; but such power in a court has never been adopted as part of the common law of Wisconsin. As the original publication was not a contempt, the attempt to punish it was an excess of jurisdiction of the court, and the defendants had a right, when summoned into court, to allege its truth. In no sense could they be held to have committed a new contempt in so doing.

## BOOK NOTICES.

*The Law of Sales.* By Francis M. Burdick, Professor of Law in Columbia University. Cloth. Pages 1., 278.

*Cases on the Law of Sales.* By Francis M. Burdick. Cloth, pages ix., 664. Little, Brown & Co., Boston, 1897.

The change since the time of our fathers in the text books set before the law students is most acceptable to the beneficiary and must be of ultimate benefit to the profession. Swift's Digest and similar works have given place to the small, handy volume crammed full of clear explanation, and apt illustration, augmented here and there by a happy quotation from the opinion of an eminent judge. This improvement is the result of the devotion of scholarly men like Prof. Burdick to the teaching of law. During his ten years' experience the author has discovered the points in his subject difficult of understanding for the student, and in his book has given fullest attention to these. Conditions and Warranties, Buyers' Rights against Third Parties, and like topics are fully discussed, and the student made to see that common sense applies even to those parts of the law. The treatment of the Statute of Frauds is novel in that its provisions are explained wherever the common law changed thereby is treated. This results in a more practical and time-saving method than devoting a separate chapter to the statute. The cases cited are few in number, but comprise the leading cases on the topics treated. The appendix contains the Factors Acts of England and of the leading States. The volume of cases intended to accompany the text-book contains the latest as well as the leading decisions on Sales, and will prove helpful to the student working with or without an instructor. To the latter it would seem well-nigh indispensable.

*State Control of Trade and Commerce.* By Albert Stickney of the New York Bar. Art canvas, 202 pages. Baker, Voorhis & Co., New York, 1897.

Two decisions in leading courts have recently caused increased attention to be paid to State control of trade and commerce. Mr. Stickney submits that those decisions are at variance with the common law, and furthermore, are not justified by a true interpretation of existing statutes. To support the first contention he has reviewed the attempts in England and America to regulate private employments by statute, showing

the statutory origin of the offenses of engrossing and others, and their abolition. He comes to the conclusion that the case of *Mogul Steamship Co. v. McGregor* states the law as it exists to-day. The author contends that the State should confine its attention to public rather than private employments. The legal basis of the control of railroads, elevators, etc., is discussed, and the present state of the law as to contracts in restraint of trade. He draws the conclusion that "a combination for the express purpose of preventing competition from all outside parties, even in the case of common carriers, was lawful; not only that it does not constitute a crime, but that it did no individual a civil injury." Against this background should be interpreted those statutes making criminal "any act injurious to trade or commerce." For "it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required." Accordingly, "it is submitted that the only reasonable interpretation of that phrase is, that it means an act which violates some legal right, of some individual or class of individuals, in a matter concerning trade or commerce." The book contains long extracts from the statutes and opinions referred to.

*The General Digest, Annotated.* New Series. Vol. 3. Law sheep, 1,562 pages. Lawyers Co-Operative Publishing Co., Rochester, N. Y.

The addition of a system of annotations has made this well-ordered serial more valuable than ever. The authorities relied upon by the court in the case digested outside its own decisions, with the cases criticised, distinguished, limited, or overruled, are added; also, to cases on the more important topics is added reference to a line of decisions *pro* and *con* upon the point involved. The arrangement thus affords a key to the law on topics so treated, and it is planned thus to furnish eventually a complete citation of cases on all important points.

*Cases on Domestic Relations and the Law of Persons.* By Edwln H. Woodruff, Professor of Law in Cornell University. Cloth, pages xviii., 540. Baker, Voorhis & Co., New York.

Some two hundred cases are here collected and arranged for class-room work. The facts in each case are concisely stated, and only relevant parts of the opinions are printed, thus saving time to the student.

*Probate Reports Annotated.* By Frank S. Rice. Vol. I. Law sheep, pages xxiv., 765. Baker, Voorhis & Co., New York, 1897.

With this volume a new start is made with the experience already gained from compiling the American Probate Reports. Only the less common decisions are to be reported, while the more important topics are to be treated in notes. Thus, in a note at page 594 ff., Jarman's and Wigram's rules for the construction of wills and Stephen's evidentiary rules are given. In the future dissenting opinions of weight are to be included.

## MAGAZINE NOTICES.

The following are some leading articles which have appeared in legal publications during the last month:

*Albany Law Journal :*

- October 9.* The Remedy of Quasi-Contract, . . . Alexander Hirschberg.  
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## OUR DUTY TO SPAIN.

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The complaints which the Spanish Ministry is said to have made to our government, of its laxness in preventing filibustering expeditions, have called out from the Secretary of the Navy an interesting rejoinder. The statement of Mr. Long attempts to show on the part of the United States a diligence in preserving its neutrality, that is not only "due" but even unusual under the circumstances. This correspondence is not yet published. The mere fact of its existence and probable tenor, is known. We cannot scrutinize the assertions of fact and law and precedent therein contained. Nevertheless, perhaps we may use the incident to advantage as a peg upon which to hang two inquiries, the one relating to fact, the other to law; the one recalling a bitter national controversy, long since settled; the other concerning the duties of a State in view of an insurrection against a friendly power, an insurrection which cannot well be recognized as belligerent.

What a faint and far-away memory that phrase "due diligence" suggests! And yet in the Alabama Claims Arbitration, a quarter century ago, national responsibility and millions of dollars in damages, rested upon its interpretation.

The military engines which the Southern Confederacy bought in neutral England prolonged the war, destroyed or drove to other flags the commerce of the North, and gave rise to the most serious complaints. Just so to-day, those military supplies which Cuba buys from the manufacturers of the United States, are prolonging the insurrection, may make independence possible, and do much to disturb our friendly relations with Spain. They likewise may serve as a basis for claims for damages, in no very distant future. There is an apparent parallelism between the two cases. Is it a real one?

The salient features of our relations with neutral powers during the Civil War, were these: the recognition of Southern belligerency by the States whose interests were affected, which thereby declared their neutrality; the application of the rules of maritime capture to them, by both sides in the war thus recognized; the sale of military supplies to the Confederates by neutral merchants, the onus of preventing their delivery resting upon the shoulders of the Northern government; finally, the despatch of armed expeditions from British soil, coupled with their illegal armament and enlistment of men, in British colonial ports, with great damage to American commerce resulting. There was an European sympathy for the Southern cause also, which was galling to the North, but it is the unneutral act, not the unneighborly sentiment, that international law takes cognizance of.

Turn now to our relations with Cuba.

As the Cuban ports of importance are all in Spanish hands, our shipping interests have not been so affected as to make the recognition of Cuban belligerency necessary. Therefore, there has been no blockade, no right to capture contraband on the high seas, no right of search of American ships except within Spanish jurisdiction. As in Great Britain in our Civil War, there has been free sale of military supplies in our markets to the Cubans, but with the assumption that the burden of preventing them from reaching their destination rested upon Spain; and lastly, armed expeditions, that is, the combination of munitions of war with men enlisted to use them, have been checked and in large measure prevented by our Government, at great cost and with much trouble, by many arrests, several trials and a few convictions, so that it can honestly say, as Secretary Long does say, that it has exercised diligence in this regard.

American sympathy for the Cuban cause exists. It is natural, even inevitable. It is galling to Spain. But we say again that expressions of sympathy are not within the cognizance of the law.

Reviewing the two cases, we see that they are not parallel, but in strong contrast.

The one was war, with neutral duties and belligerent rights. The other is an insurrection, involving no neutral obligations, strictly speaking, and no belligerent rights. The one put the duty of preventing contraband articles from reaching their destination where it belonged. In the other Spain appears to shirk this duty; to try and place it upon the wrong shoulders. Negli-

gence in the Alabama, Florida and Shenandoah cases, made Great Britain liable for the damage they caused, while no such scandal in connection with Cuba can be brought home to the United States. Its seaboard is long and intricate, the Cuban coast near, absolute prevention of hostile expeditions well-nigh impossible. But by the use of both navy and revenue service the coast has been so efficiently policed as to make the despatching of such expeditions very hazardous and very uncertain. Due diligence has been observed. Can more be demanded?

And now for the second inquiry.

What is the law to govern a State in its relations to a mere insurrection in a friendly country?

Is a State's own statutory law the sum and measure of its duty in the case?

How far does the character of lawful commerce attach to trade with the insurgents in military supplies?

Such questions as these have forced themselves upon both executive and judicial departments in the United States within the past three years. But there must naturally be a difference in their point of view. The executive is guided by the general principles of international law, and by its conviction of national policy; while the courts, though also applying international law, must be specifically bound to employ and interpret the statutes enacted for the enforcement of that law. Violation of the rights of another power by the executive calls for redress. So, too, insufficiency of the statute, as interpreted, founds a valid claim for damages. But an unpalatable interpretation of a statute is not a ground for complaint, unless bad faith can be proven. Where an insurrection breaks out in another state it is to be remarked that one's own political relations with that state are necessarily affected, for it involves the commerce and the property rights of our citizens. If of a character to warrant it, the insurrection will be recognized as belligerent. We are presupposing, however, that for one reason or another this course is inadmissible. There results no recognized war. There can, therefore, be no neutrality (since neutrality implies war), nor any neutral duties. We have so-called neutrality acts, which operate without war, it is true, but the "neutrality" is here merely a convenient name, and not a proof of status. The same thing in England is called a Foreign Enlistment Act.

But though there may be no neutral duties and rights, technically speaking, there are nevertheless the duties which every



state owes to every other; there are the rights of commercial freedom which every state enjoys, and there is the right of self-defense, the duty of maintaining its own integrity, which the insurgents sovereign possesses.

These fundamental rights do not depend for their operation upon any formal recognition of belligerency. Nor can I see that they are called into being or changed in any way, by the new-fangled recognition of insurgency—a phrase ascribed to the late Dr. Wharton. When an internal disturbance in a friendly state is serious enough to affect another state's interests, the executive consciousness of that fact finds expression. In our own case, the form of expression will usually be a reference in some message of the President to give notice of the facts and warn us to obey our own statutes. This is what is meant by the term, recognition of insurgency.

Now as to the private trade in war material. It is certain that such trade with an insurgent body is at least as lawful and unrestricted as with a recognized belligerent. The usage in the latter case is unquestioned. Private trade in contraband is permitted. Even where carrying contraband is forbidden by executive order, as is sometimes done,<sup>1</sup> this simply means, in actual practice, that the trade is liable to the penalty of confiscation, if the offender is caught by the injured belligerent. The neutral is never held responsible for the traffic in contraband so long as it is purely a commercial transaction. Accordingly, a body of law has grown up to govern such cases. States define contraband by treaty. Such goods may be seized unless the treaty substitutes preëmption for confiscation. They may be seized on the high sea even, if their hostile destination is clear. In certain cases the ship is liable also. But the burden of prevention is not saddled upon the neutral. The law and usage are the resultant of two principles, the freedom of neutral trade, and the belligerents' right of self-defense.

In the case of insurgency rather than belligerency, the only question is whether the freedom of trade in war material is not enlarged, whether the right of seizure is not restricted to the coast sea of the insurgents sovereign. In the case of an armed expedition like the *Virginius* there is authority and reason for believing that search and seizure on the high seas are warranted on the ground of self-defense. A similar claim to prevent the trade in war material would probably not be submitted

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<sup>1</sup> *E. g.*, by both British and Spanish proclamations of neutrality at the outset of our Civil War.

to. However, for our present purposes, it is not necessary to discuss this point. It is enough to emphasize the general law, that no government can be held accountable for its citizens' traffic in military supplies, not furnished to a visiting man-of-war, nor in the hands of an expeditionary force. Its duty is fulfilled when its subjects are warned of the risk of loss which they incur by engaging in it.

The distinction already referred to, between contraband goods which are mere commodities, and the same goods it may be, with an organized body of men to use them, is a perfectly reasonable one. It is the distinction between trade and an armed expedition—between peace and war.

An insurrection breaks out in one of two states which are at peace. The other is bound to prevent all persons within its jurisdiction from assisting to wage war against its friend. Where a ship is armed or men enlisted and an expedition set on foot, with intent to assist the insurgent cause, that is waging war. If such acts are made possible through the negligence of the authorities, through lack of appropriate legislation, or through a judicial breakdown involving more than an unpalatable interpretation of the law, they are unfriendly and a ground for damages.

This, then, in its simplest terms, is the sum of the rights and duties which obtain between the United States and Spain at the present time; to carry on trade with the Cubans even in war material, subject to the Spanish right of seizure within their own coast sea; to prevent our soil from being made a base from which Cuban sympathizers wage war against Spain. These two are the cardinal points, under the general principles of the law of nations.<sup>3</sup> Such general principles in a vital matter like this should and do find expression and sanction in local legislation, and such statutes are interpreted and enforced by the courts. Neither insufficiency of the law, nor difficulty in enforcing it, will excuse a government. As our diplomatists kept urging upon England in the Alabama discussion, "If the law is insufficient, amend it; if sufficient, enforce it."

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<sup>3</sup> The simplicity of the rule may be complicated by actions which involve a violation or evasion of our revenue laws. Thus a ship with contraband and a commercial crew, may clear for Havana, whereas, her real destination is inferred to be some landing place, not a port of entry, on the Cuban coast. In this connection the *Itata* case at San Diego may be recalled, which ship took French leave of the authorities, and failed to comply with the port regulations, yet the court acquitted her of the charge of violating the neutrality statute.

Our next inquiry thus relates to the adequacy of our own statutes, and to the good faith and effectiveness of their interpretation and enforcement.

The statutes applicable to such aid as Cuba has sought, are two, Sections 5283 and 5286 of the Revised Statutes of the United States.

The first is aimed at "every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures \* \* \* etc., or is concerned in \* \* \* etc., with the intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state or of any colony, district or people, with whom the United States are at peace. \* \* \*"

Here the offense is to be committed by means of a vessel and that vessel must be armed. On this ground some prosecutions have failed. Another point is, that the vessel is to be "employed in the service of any foreign prince or state, or of any *colony, district or people*." Do the Cuban insurgents correspond to this latter description?

Mr. Justice Brown, in the *Carondelet* (37 Fed. Rep. 799), seems to hold to the contrary, and Judge Locke, in the *Three Friends*,<sup>3</sup> last year, took the same view. Justice Brown said: "A vessel could hardly be said to enter the service 'of a foreign prince or state or of a colony, district or people' unless our government had recognized Hippolyte's faction as at least constituting a belligerent," but the decision turned on another point. The contrary view was taken by Mr. Wharton and Attorney-General Hoar, who believed this statute applicable to, and intended for just such an insurgent body as the Cubans form. In contrast to this indefiniteness in the American statute, compare the wording of the British Foreign Enlistment Act. This forbids similar aid given to "any foreign prince, colony, province, a part of any province or people, or any person or persons exercising or assuming to exercise the power of government in or over any foreign country, colony, province, or part of any province or people." In the English case, *The Salvador*, the lower court held like Judge Locke, that the statute did not apply to unrecognized insurgents in Cuba. But this decision was overruled by the Judicial Committee of the Privy Council (*The*

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<sup>3</sup> See YALE LAW JOURNAL, Vol. VI., No. 5, p. 283.

*Salvador*, L. R., 3 P. C. 218). In view of the judicial interpretation of our statute, it would seem that it is inferior in comprehensiveness to the English Act. But that it is so faulty as to ground a claim for damages for unneutral conduct against the United States, is very improbable. For it is sufficiently doubtful, to warrant a trial if not a conviction, to detain the ship although it may not forfeit it, and, besides this, Section 5286 is comprehensive enough to forbid such an armed expedition as would be obnoxious to the general principles of international law already laid down. This reads as follows: "Every person who, within the territory of the United States, begins or sets on foot, or prepares the means for, any military expedition or enterprise, to be carried on from thence, against the territory or dominions of any foreign prince or state, or of any colony district or people, with whom the United States are at peace, shall be deemed guilty," etc. Plainly, this statute is operative without any recognition of belligerency and abundantly satisfies the requirements of international law which forbid one state to permit any hostile expedition to be prepared within its jurisdiction against another state, its friend.

This, then, is the answer to the questions which we asked at the outset: that trade in military material is lawful to the individual; that the duty of a state is measured not by its statutes but by the requirements of international law; that if those statutes, as interpreted by its courts, are insufficient to lay down its international duties and prevent their violation, that state is liable; and that in the case of Spain and Cuba our statutes are not strikingly faulty, although one could certainly be made clearer and more comprehensive.

This Cuban insurrection, like the one in the seventies, has put the United States into a difficult position. Its trade has been cut off; its resources taxed to preserve its neutrality. But as several convictions show, and as the records of the navy and revenue service testify, it has performed its international duties with fidelity, with patience and with success.

*Theodore S. Woolsey.*

YALE UNIVERSITY, December 1, 1897.

## THE EFFECT OF A DECREE OF CONFIRMATION UNDER THE CALIFORNIA IRRIGATION DISTRICT LAW.

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To promote the reclamation of the vast areas of arid lands within its territorial jurisdiction, the Legislature of California, on the 7th day of March, 1887, passed an Act entitled, "An Act to provide for the organization and government of irrigation districts and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes" (Cal. Stats. 1887, p. 29). This act will be hereinafter called the "Wright Act." The irrigation districts organized under this law having experienced no small difficulty in effecting the loans necessary to enable them to construct their proposed systems of reservoirs, canals and ditches, the Legislature of the State came to their assistance with the supplementary Act of March 16, 1889, commonly called the "Confirmation Act" (Cal. Stats. 1889, p. 212). This act provided in substance that the board of directors of any irrigation district organized under and in pursuance of the Wright Act might commence and prosecute in the courts of the state a special proceeding for the judicial determination of all proceedings of the district and of its board of directors by which the validity of the issue and sale of district bonds might be effected. The confirmation proceedings were authorized to be maintained either before or after the negotiation of a sale of the bonds. The manner in which jurisdiction should be acquired and exercised in such proceedings was prescribed in detail. Ample opportunity was afforded to all persons interested to appear and contest the petition of the board of directors. The purpose of the Confirmation Act is well stated in the opinion of the Supreme Court of California rendered in the case of the Board of Directors of Modesto Irrigation District *v.* Tregoe, 88 Cal. 334, 338, as follows:

"As the validity of the bonds when issued depends upon the regularity of the proceedings of the board, and upon the ratification of the proposition by a majority of the electors, it is matter of common knowledge that investors have been unwilling to

take them at their par value while all the facts affecting their validity remain the subject of question and dispute."

"To meet this inconvenience—for the security of investors, and to enable the irrigation districts to dispose of their bonds on advantageous terms—the Supplemental Act, under which this proceeding was instituted, was passed."

All the legislation relating to the formation of irrigation districts, and to their powers and functions, was revised and consolidated in 1897 (Cal. Stats. 1897, p. 254). In Sections 68-73 of this act provision is made for confirmation proceedings similar to those authorized by the old Confirmation Act.

The importance of these and similar legislative attempts to provide for the systematic reclamation by public authority of the arid lands lying in the western and southwestern parts of the United States is not easy of estimation. The constitutionality of the Wright Act in its principal provisions was fully sustained in *Fallbrook Irrigation District v. Bradley et al.*, 164 U. S. 112. But the constitutionality of the Confirmation Act and the effect of the decrees of the state courts confirming or refusing to confirm the proceedings of the irrigation districts leading to the issue and sale of bonds are, it must be conceded, still the cause of very distressing anxiety to the owners of securities of the irrigation districts; and, to the irrigation districts themselves, the occasion of no slight financial embarrassment. This unfortunate state of affairs—unfortunate alike for the investors in district bonds and the owners of irrigable lands—is largely attributable to what, it is submitted, is a serious misapprehension of the import of the opinion which the Supreme Court of the United States rendered November 16, 1896, in the case of *Tregea v. Modesto Irrigation District*, 164 U. S. 179. The misapprehension appears to be based in part upon the respect with which the opinions of that high tribunal are deservedly received, but in far greater part upon a failure to apply the principles of constitutional law in the light of which this particular opinion ought to be read.

It is proposed therefore to examine, somewhat minutely, the legal principles determining what effect, in the present state of the authorities, should be given to a decree of the state courts confirming and approving the proceedings leading to an issue of bonds by irrigation districts organized under the provisions of the Wright Act.

There is no need of argument to show that, in determining this matter, it is the duty of all courts, whether state or federal,

to be controlled by the supreme law of the land as defined in the second paragraph of Article VI. of the Constitution of the United States:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

But, subject only to the express and implied limitations and restrictions imposed upon the political power of the states by the supreme law of the land as defined in the Constitution of the United States, each state is possessed of supreme, uncontrollable political authority within its territorial limits. In other words, each state, within its territorial jurisdiction, and within the sphere of its political authority, is sovereign (*Tarble's Case*, 13 Wallace, 397, 406; *Ableman v. Booth*, 21 Howard, 506).

In the people of each state inheres the legal right to establish their own constitution of government, provided that in so doing they neither invade the sphere of the nation's sovereignty, nor otherwise come in conflict with the supreme law of the land. The people of the State of California have, by their constitution, created a legislature with power to enact laws for their government within the sphere of the state's sovereignty, and, within that sphere, possessed of powers limited only by the provisions of the state constitution. The people of the State of California have also, by their constitution, created a judiciary with power to hear and finally to determine all controversies of a judicial nature arising under their constitution and laws, and not within the jurisdiction of the federal courts. And, as has been so well said by the late Hon. Thomas M. Cooley, "the same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national courts, will also hold the national courts bound to respect the decisions of the state courts upon all questions arising under the state constitution and laws, where nothing is involved of national authority, or of right under the Constitution, laws or treaties of the United States; and to accept the state decisions as correct, and to follow them whenever the same questions arise in the national courts" (*Const. Lim.* 6th ed., pp. 20, 21).

Among the matters, with respect to which the judgment of the highest state tribunal is conclusive and binding, not only upon the inferior courts of the State, but even upon the Supreme

Court of the United States, the construction of the state constitution and of the acts of the state legislature stands foremost. It is the established doctrine of the Supreme Court of the United States that it will adopt and follow the decisions of the state courts in the construction of their own constitutions and statutes, when that construction has been settled by the decisions of the highest tribunal of the state, whatever may be the opinion entertained by it of the original soundness of such construction. To this doctrine some exceptions have been recognized; such exceptions, for the most part, having been designed to protect the substantial rights of citizens who, in reliance upon decisions of the state courts, have entered into contracts or acquired property only to find the earlier decisions soon overruled by the same court by which they were pronounced. None of the exceptions have to do with cases where the construction of the state constitution or statutes by the state courts has been uniform (*Morley v. L. S. & M. S. Ry. Co.*, 146 U. S. 162; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440; *Fairfield v. County of Gallatin*, 100 U. S. 47; *Burgess v. Seligman*, 107 U. S. 20, 33-4).

In *Fairfield v. County of Gallatin*, *supra*, it appears that the Supreme Court of the United States had previously placed a construction upon a provision of the constitution of the State of Illinois in ignorance of the fact that the supreme court of that state had theretofore construed it in a different manner. Yet, in that case, the United States Supreme Court thought itself in duty bound to follow the state court and to adopt as the true construction of the state constitution that which the state court had declared.

The construction, therefore, of a state constitution or statute does not present a federal question, at all events unless the state court of last resort has at different times in construing such constitution or statute, rendered inconsistent and conflicting decisions. Nor does a conflict between an act of a state legislature and the state constitution ordinarily give rise to a federal question. But whether or not a state constitution or statute, as construed by the state court of last resort, is in conflict with the supreme law of the land, is a question to be finally determined by the Supreme Court of the United States.

It has been contended that the operation of the California irrigation district law including the Confirmation Act, is to deprive property owners residing within irrigation districts of property without due process of law. But, since the decision of the case of *Fallbrook Irrigation District v. Bradley*, *supra*, this



contention is obviously without merit, unless it be considered that the confirmation proceedings, which are designed to result eventually in deprivation of property, do not constitute due process of law upon the ground that the Confirmation Act imposes upon the courts of the state other than judicial duties in violation of the state constitution.

At this point let us take up the case of *Tregea v. Modesto Irrigation District*, *supra*. It does not appear from the published reports of this case whether or not there were brought to the notice of the court any of the California cases construing the Confirmation Act, except *Board of Directors of the Modesto Irrigation District v. Tregea*, *supra*. At all events, the Supreme Court construed the act and considered the nature of the proceedings as if these matters were yet open. Assuming that the construction of the Confirmation Act is as yet undetermined by the Supreme Court of California the opinion of the Supreme Court of the United States in *Tregea v. Modesto Irrigation District*, *supra*, is entitled to great weight in any attempt to determine the meaning of the Confirmation Act. It is important, therefore, to ascertain exactly what was determined by that court, and upon what consideration its determination was based. In that case, it is submitted, one point, and one point only, was decided, viz., that the Supreme Court of the United States could not acquire or exercise jurisdiction of the special proceedings authorized by the Confirmation Act. This decision was based entirely upon the ground that such confirmation proceedings do not constitute "a case or controversy with opposing parties, such as can be submitted to or compel judicial consideration or judgment." Notwithstanding the fact that three Justices dissented from the opinion of the majority of their brethren, the decision appears, to the present writer at least, to be in perfect harmony with settled principles. Upon the ground set forth above the federal courts will be forever precluded from taking jurisdiction of proceedings instituted under the Confirmation Act.

In ruling thus, however, the Supreme Court plainly considered the matter solely in the light of Article III. of the Constitution of the United States which defines the powers of the federal judiciary. For the Supreme Court is careful to say that it is "not concerned with any question as to what a state may require of its judges and courts, nor with what measures it may adopt for securing evidence of the regularity of the proceedings of its municipal corporations." And this is a most important distinction as will be observed upon an examination of the case of *Forsyth v. Hammond*, 166 U. S. 506.

From the report of the last-mentioned case, it appears that the City of Hammond had instituted proceedings in one of the courts of Indiana, and had obtained a decree of that court annexing to the city certain lands belonging to Forsyth and others. Forsyth appealed from that decree; and, before the Supreme Court of Indiana, contended that the decree in the lower court was null and void as having been rendered without jurisdiction. The ground upon which this contention was made was that the proceedings for annexation of territory to the municipality were legislative, and not judicial, in their nature; or, to use the language of Mr. Justice Brewer in the case of *Tregea v. Modesto Irrigation District*, *supra*, did not constitute "a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment." The state supreme court decided in favor of the jurisdiction. Subsequently, Forsyth filed a bill in the Circuit Court of the United States for the District of Indiana, against the City of Hammond and others, to restrain the collection of certain taxes which had been levied upon her land annexed to the city as already mentioned. Her bill set forth the proceedings leading to the annexation of her lands to the city, "but averred that those proceedings were void because the enlargement of the limits of the city was a matter of legislative and not of judicial cognizance, and that it was not competent for the Legislature to intrust to the courts, the decision of such questions." The Circuit Court dismissed the bill; but its judgment was reversed by the Circuit Court of Appeals which ruled in accordance with the contentions of plaintiff Forsyth. The Supreme Court of the United States reversed the decree of the Circuit Court of Appeals upon the ground "that the construction, by the courts of a state, of its constitution and statutes, is, as a general rule, binding on the federal courts," even though they think that the state court has misconstrued such constitution and statutes.

Upon the principles declared in *Forsyth v. Hammond*, *supra*, it is the duty of the inferior courts of California to give effect to a decree of confirmation duly given and made in pursuance of the Confirmation Act, in accordance with the decisions of the state supreme court; and it is equally the duty of the federal courts, whenever such a confirmation decree shall be pleaded or introduced in evidence in causes of which they have jurisdiction, to follow the state decisions. If, as the fact is, the California Supreme Court has decided that confirmation proceedings are so far judicial in their nature as to be capable of being submitted

to and of compelling judicial consideration and judgment in the state courts, the further question whether such proceedings are to be considered as operating *in rem* or *in personam* is also one upon which its decision is conclusive (*Wood v. Brady*, 150 U. S. 18, 23).

A consideration of the points thus far advanced will show that the original question has been narrowed to this, What construction and effect has the Supreme Court of the State of California given to the Confirmation Act?

In the case of *Cullen v. Glendora Water Company*, 113 Cal., 503, 511, 516, there was presented to the Supreme Court of the State of California, for its determination the very question which was passed upon by the Supreme Court of the United States in the case of *Tregea v. Modesto Irrigation District*, *supra*, the court stating the point as follows: "Counsel for appellant contend that the Act of March 16, 1889, providing for a judicial examination, approval, and confirmation of bonds of irrigation district, is unconstitutional for the reason that it authorizes a court to hear and determine what will be the rights of parties interested in those bonds, in advance of any controversy as to such rights." The Supreme Court of California ruled against this contention, and sustained the Confirmation Act as constitutional just as the Supreme Court of Indiana had upheld the constitutionality of the statute considered in the case of *Forsyth v. Hammond*, *supra*.

Not only has the constitutionality of the Confirmation Act been upheld by the Supreme Court of this State, but the nature and effect of the decree rendered in confirmation proceedings have been judicially considered and determined. In the case of *Crall v. Poso Irrigation District*, 87 Cal. 140, 146, it was decided, (1) that the confirmation proceeding, denominated in the act a special proceeding, is in the nature of a proceeding *in rem*, the object being to determine the status of the district and its power to issue valid bonds; and (2), that the judgments rendered in confirmation proceedings are conclusive and binding upon all the world until reversed on appeal, or set aside by some direct proceeding instituted for that purpose. Upon the authority of *Crall v. Poso Irrigation District*, *supra*, the Supreme Court of this State decided the same questions in the same way in the case of *Rialto Irrigation District v. Brandon*, 103 Cal. 384. And the same construction is placed upon the Confirmation Act in *Cullen v. Glendora Water Company*, *supra*, and in *Modesto Irrigation District v. Tregea*, *supra*, which is the very case taken

up to the Supreme Court of the United States and there reported as *Tregea v. Modesto Irrigation District*. Since the United States Supreme Court dismissed the case of *Tregea v. Modesto Irrigation District*, the Supreme Court of the State of California has exercised jurisdiction upon appeal from a decree by the Superior Court of Colusa County confirming proceedings resulting in the organization of the Central Irrigation District (*in re* Central Irrigation District, 49 Pac. Rep. 354). In this case no intimation is given of any change of mind on the part of the Supreme Court of this State respecting the construction and effect of the Confirmation Act.

It is to be observed that the Supreme Court of the United States, in arriving at the conclusion that a decree by a state court approving and confirming each and all of the proceedings for the organization of an irrigation district under the provisions of the Wright Act, from and including the petition for the organization of the district, and of other proceedings which may affect the legality and validity of the bonds of such district, and the order for the sale, and the sale thereof, cannot be invoked as *res judicata*, appears to have considered as of great importance that a decree refusing to confirm such proceedings would not be conclusive in respect to negotiable paper as against purchasers thereof without notice of the suit or decree. In that part of its opinion devoted to this point, it is submitted, the Supreme Court slightly misconceived the purpose and scope of the Confirmation Act as determined by the courts of California. The purpose of the Confirmation Act is to provide for a judicial examination and determination of the "legality and validity of all the proceedings for the organization of irrigation districts, and all other proceedings affecting the legality or validity of the bonds of such district, including the order for the sale, and the sale of such bonds." In other words, the purpose of the Act is to provide for the judicial determination of the status of the district and of the regularity of its proceedings, and only indirectly to establish the status or character of bonds as valid or invalid in their inception (*Crall v. Poso Irrigation District*, 87 Cal. 140, 146; *in re* Madera Irrigation District, 92 Cal. 296, 340).

A decree rendered, in conformity with the provisions of the Confirmation Act, refusing to approve and confirm the proceedings affecting the legality of bonds issued or to be issued, if given the force of a judgment *in rem*, would merely establish the fact or facts, from which the necessary inference would be that the bonds of the district were invalid in their inception.

Proof of such an adjudication would merely put upon the owner of bonds the burden of proving that he was a *bona fide* purchaser for value, in the ordinary course of business, before maturity (*Eames v. Crosier*, 101 Cal. 216; *Stewart v. Lansing*, 104 U. S. 505). The rights of holders of irrigation district bonds proved by such an adjudication to be invalid in their inception do not appear to have been passed upon yet by the courts. Causes involving such rights, when they arise, will undoubtedly be decided upon the facts peculiar to each case, in accordance with the usual rules which determine the liability of municipal corporations on securities issued by them.

*Wm. Bradford Bosley.*

SAN FRANCISCO, CAL., November 29, 1897.

## RIGHTS, DUTIES AND REMEDIES OF THE PARTIES TO A SALE OF PERSONAL PROPERTY WHICH IS TO BE DELIVERED AND PAID FOR IN IN- STALMENTS.

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It will be convenient first to consider the legal relations of the immediate parties to the sale, and then to inquire what claims third parties have to goods sold in this manner, against the vendor and vendee. Sales on what is now known as the "instalment plan" are of comparatively recent origin, though contracts for successive deliveries will be found in the old reports. In neither case, however, have the courts taken a broad view of the subject with regard to the future development of the law, and each case seems to have been decided according to the equity of the facts in issue, thus causing a confusion in the cases which will be found upon inquiry to be more apparent than real. It is probable that, in the absence of express stipulation at least, the failure of the vendee to pay an instalment does not so readily work a forfeiture of the contract as the failure of the vendor to deliver. This is partly because the legal rate of interest is supposed to be sufficient compensation for the non-payment of money, and partly because recovery can more easily be had in an action. The question of the vendor's right to rescind for failure to pay an instalment depends, however, upon whether or not the contract is entire.<sup>1</sup> *Prima facie*, such contracts are severable,<sup>2</sup> but merely because a contract consists of several entire items which are not to be performed at the same time, and each of which has a stipulated value, will not be a reason for refusing to construe it as entire.<sup>3</sup> If each stipulation "so went to the root of the matter as to make its performance a condition of the obligation to proceed in the contract" it is an entire contract.<sup>4</sup> In all cases intention governs,<sup>5</sup> and the mode of measuring the price will not render the contract severable if it was intended to be

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<sup>1</sup> Thomson v. Conover, 3 Vroom 466.

<sup>2</sup> Quigley v. DeHaas, 1 Norris 267.

<sup>3</sup> Smith v. Lewis, 40 Ind. 98.

<sup>4</sup> Catlin v. Tobias, 26 N. Y. 217; Jenness v. Shaw, 35 Mich. 20.

<sup>5</sup> Tipton v. Feitner, 20 N. Y. 423.

entire.<sup>6</sup> If, however, there is an express or implied apportionment of the consideration the contract is severable,<sup>7</sup> and where it is provided that payment shall be made upon the delivery of each instalment it will be so construed.<sup>8</sup> If, therefore, the contract be construed as entire, and *a fortiori* if the parties to the contract express their intention that the contract shall be entire, or say that the non-payment of any one instalment shall work a forfeiture as long at least as the contract remains executory the forfeiture will be enforced.<sup>9</sup> This is the usual manner of drawing up contracts of sale on the instalment plan, and as freedom of contract is encouraged by the courts, they will usually be carried out according to their intendment. If it is part of the contract that upon failure to pay an instalment the vendor may recover back his property, it has been said that the fact that he does so does not constitute a rescission of the contract, but a fulfillment of it according to its terms.<sup>10</sup> The vendor would not be guilty of trespass in so doing,<sup>11</sup> even if he use deception in retaking his property;<sup>12</sup> but in some jurisdictions it is said that before the retaking he must exercise his right to rescind.<sup>13</sup> In any case the vendor need not tender back the partial payments already made.<sup>14</sup> But if the goods delivered were not such as were stipulated for the vendor would be obliged to pay back such instalments as he has received,<sup>15</sup> together with damages in case there was a warranty, the contract being then at an end.<sup>16</sup> It has been said that if the article is not merchantable the vendee may show this fact and that as much as the article is worth has been paid, and thus keep the goods and be absolved from further payments.<sup>17</sup> It is submitted that this is not good law. Each failure to pay an instalment is a fresh breach of the contract.<sup>18</sup> The strict carrying out of such contracts, however, oftentimes leads to harsh results, as in the case of *Whelan v. Couch*,<sup>19</sup> where the

<sup>6</sup> *Shinn v. Bodine*, 60 Pa. 182.

<sup>7</sup> *Lucesco Oil Co. v. Brewer*, 66 Pa. 351; *Rugg & Bryan v. Moore*, 110 Pa. 236.

<sup>8</sup> *Sawyer v. Chicago & N. W. R. R. Co.*, 22 Wis. 385.

<sup>9</sup> *Tyson v. Doe*, 15 Vt. 571.

<sup>10</sup> *Latham v. Sumner*, 89 Ill. 233.

<sup>11</sup> *Smith v. Sozo*, 42 Mich. 6.

<sup>12</sup> *North v. Williams*, 12 Centr. Rep. (Pa.) 369.

<sup>13</sup> *Giddey v. Altman*, 27 Mich. 206.

<sup>14</sup> *Haviland v. Johnson*, 7 Daly 297; *Duke v. Snackleford*, 56 Miss. 552.

<sup>15</sup> *Singer Sewing Mach. Co. v. Treadway*, 4 Brawd. (Ill.) 57.

<sup>16</sup> *Dike v. Reitlinger*, 23 Hun. 241; *American & Co. v. Gillette*, 88 Mich. 231.

<sup>17</sup> *Guilford, Woods & Co. v. McKinley*, 61 Ga. 230.

<sup>18</sup> *Hunter v. Daniel*, 4 Hare 432.

<sup>19</sup> 26 Grant's Ch. Rep. 74.

tender of the last instalment of \$9 on the sum of \$1,078 upon Monday was refused because it had been due on the previous Saturday, and it was held to work a forfeiture. The sum thus forfeited was not an extortionate sum regarded as rent, but whether this be so or not in a given case such a result must always come from the logical working out of the contract. Upon default the seller may resume possession,<sup>20</sup> even though nothing is said in the contract on this subject, this being an implied condition of the sale.<sup>21</sup> When possession is resumed this in itself puts an end to the contract and the seller cannot recover any balance due on the purchase price.<sup>22</sup> But, if he prefer, the vendor may bring an action on the price,<sup>23</sup> in which case the buyer cannot offer to rescind.<sup>24</sup> The accidental destruction of the property will probably not excuse the vendee from paying the purchase price.<sup>25</sup> There may be an express or implied waiver of the failure to pay an instalment when due, such as the receipt of a subsequent instalment.<sup>26</sup> But a waiver of one forfeiture is not relevant evidence of a waiver of subsequent forfeitures.<sup>27</sup> Such a waiver will give the buyer a right to complete his title on payment of the residue, but an agent to collect has no power to make such a waiver.<sup>28</sup> If no time is mentioned for payment it will be presumed that it is to be made on delivery,<sup>29</sup> but if the payments are not to be made in instalments the time of payment will be on delivery of all the goods, although the deliveries are successive.<sup>30</sup> The vendee must prove he was ready to receive and pay for the goods as delivered.<sup>31</sup> The purchaser may at any time tender the balance, notwithstanding the instalments are not yet due, and thus perfect his title.<sup>32</sup> If the vendee fail to pay an instalment the vendor may refuse to make a subsequent delivery until this is paid, although

<sup>20</sup> *Wiggins v. Snow*, 89 Mich. 476; *Goldie v. Rascony*, 4 Mont. L. Rep. 313; *Sere v. McGovern*, 65 Cal. 244.

<sup>21</sup> *Edwards v. Symonds*, 65 Mich. 348.

<sup>22</sup> *Hineman v. Matthews*, 138 Pa. 204.

<sup>23</sup> *Monroe v. Williams*, 37 S. C. 81.

<sup>24</sup> *Appleton v. Norwalk*, 53 Conn. 4.

<sup>25</sup> *Burnley v. Tufts*, 66 Miss. 48.

<sup>26</sup> *Hutchings v. Munger*, 41 N. Y. 155; *Cushman v. Jewell*, 7 Hun. 525.

Contra: *Hegler v. Eddy*, 43 Cal. 597.

<sup>27</sup> *Hill v. Townsend*, 69 Ala. 286.

<sup>28</sup> *Hutchings v. Munger*, *supra*.

<sup>29</sup> *Metz v. Albrecht*, 52 Ill. 491.

<sup>30</sup> *Timmons v. Nelson*, 66 Barb 594.

<sup>31</sup> *Bronson v. Wiman*, 4 Seld. 182; *Mount v. Lyon*, 49 N. Y. 552.

<sup>32</sup> *Cushman v. Jewell*, *supra*.



otherwise this would be a breach of the contract upon his part.<sup>33</sup> Although these contracts come under the head of conditional sales, it has been held that an action will lie for an absolute promise to pay on the part of the vendee.<sup>34</sup> If he has been sued for the price of any one delivery, it seems that he must set up his damages for failure to make subsequent deliveries by way of counter-claim, otherwise such defense is waived.<sup>35</sup> The purchaser cannot accept an instalment delivered too late and refuse to pay for it on the ground that he sets the payment off against the damages sustained by non-delivery.<sup>36</sup> If the sale takes the form of a lease it is nevertheless generally construed as a conditional sale,<sup>37</sup> and parol evidence is admissible to show that the parties so understood it.<sup>38</sup> The vendor cannot treat such a contract as a lease and sue for damages for its breach.<sup>39</sup> Some courts have refused to allow such contracts to work a forfeiture of the instalment already paid unless it is clear that the measure of damages thus stipulated for is based on adequate compensation.<sup>40</sup> It has accordingly been held that when the vendor resumes possession the buyer can recover an equitable proportion of the sums already paid.<sup>41</sup> This proportion would be the instalments paid less a reasonable sum for hire and damages.<sup>42</sup> This seems to the writer to be an unwarrantable interference with the freedom of contract. In some States the matter has been regulated by statute, as in Missouri<sup>43</sup> and Ohio,<sup>44</sup> where it is provided that the vendor cannot retake his property without tendering back a reasonable amount. Such a statute is not void as taking away property without due process of law,<sup>45</sup> but it is at the best meddlesome legislation. Equity, however, will not aid the vendor to recover back his property unless he make restitution<sup>46</sup> and lapse of time will readily be construed into a waiver.<sup>47</sup>

<sup>33</sup> *Raabe v. Squier*, 148 N. Y. 81.

<sup>34</sup> *Marvin Safe Co. v. Emanuel*, 21 Abb. N. C. 181; Affirmed 14 S. R. 681.

<sup>35</sup> *O'Neill v. Crotty*, 16 Daly, 474.

<sup>36</sup> *Bradley v. King*, 44 Ill. 339.

<sup>37</sup> *Greer v. Church*, 13 Bush. 430.

<sup>38</sup> *Wire Book Sewing Mach. Co. v. Crowell*, 8 Atl. Rep. 22.

<sup>39</sup> *Loomis v. Bragg*, 50 Conn. 228.

<sup>40</sup> *Johnston v. Whittemore*, 27 Mich. 463.

<sup>41</sup> *Simon v. Edmundson*, 10 Pa. Co. Ct. Rep. 315; *Preston v. Whitney*, 23 Mich. 260.

<sup>42</sup> *Snook v. Raglan*, 15 S. E. Rep. 364 (Ga.).

<sup>43</sup> Rev. St. of Mo., Sec. 2508.

<sup>44</sup> Ohio, Act of 1885, p. 239, Sec. 2.

<sup>45</sup> *Weil v. State*, 46 Ohio St. 450.

<sup>46</sup> *Lincoln v. Quynn*, 68 Md. 299.

<sup>47</sup> *Gorham v. Holden*, 79 Me. 317.

The later English cases, and some American cases, have formulated a rule which, if not carried too far, should be useful in solving these contracts. The doctrine ought not to be applied to contracts in which there is an express stipulation that upon one default in payment the vendor may resume possession and the amount paid shall be regarded as rent. These agreements solve themselves, with the modifications and exceptions noted above. But where nothing is said on this subject, and there is a default, it has been decided that this in itself will not work a forfeiture unless from the fact of the default it may be reasonably surmised that the vendee did not intend to carry out the contract. Thus in the leading case of *Freeth v. Burr*,<sup>48</sup> a failure to pay an installment because of a mistaken impression on the part of the buyer that he could withhold payment as a set-off for the failure to deliver an earlier instalment, was held not to entitle the vendor to rescind. This case is said to have been decided on the authority of *Withers v. Reynolds*,<sup>49</sup> though the analogy is not apparent. And in a later case this doctrine was approved, the reason for the failure to pay being the erroneous advice of counsel, and it was said: "You must look at the circumstances of each case. \* \* \* You must examine what the conduct is, so as to see whether it amounts to a renunciation."<sup>50</sup> An intention to abandon might be inferred from the fact that the vendee refused to give notes as agreed upon the delivery of each instalment, and the vendor would be entitled to rescind before the completion of the contract,<sup>51</sup> or from the failure to sell the articles for cash and remit payments promptly if this were part of the contract.<sup>52</sup> But if the vendor choose to treat the contract as subsisting he may sue for each instalment as it falls due.<sup>53</sup>

In this country several cases are at least authority for the proposition that "where the failure to pay is due to some accident or oversight, or is attended with facts and circumstances which are inconsistent with an intention to abandon the contract, the buyer will not forfeit the benefits of the sale if he makes a tender of the future instalments of payments,"<sup>54</sup> thus putting

<sup>48</sup> L. R., 9 C. P. 208.

<sup>49</sup> 2 B. & A. 882.

<sup>50</sup> *Mersey Steel & Iron Co. v. Naylor*, L. R., 9 Ap. Cases 434.

<sup>51</sup> *Nichols v. Scranton Steel Co.*, 137 N. Y. 471; *Patridge v. Gildermeister*, 1 Keys 93; *Stockdale v. Schuyler*, 8 N. Y. Sup. 813.

<sup>52</sup> *Stewart v. Many*, 7 Brawd. 508.

<sup>53</sup> *Clark v. Dill*, 11 Atl. Rep. (Pa.) 82.

<sup>54</sup> *Hime v. Klasey*, 9 Ill. Ap. 166; *Midland R. R. Co. v. Ontario Rolling Mills*, 10 Ont. Ap. 77; *Gill v. Benjamin*, 64 Wis. 362.

the doctrine above enunciated in a rather negative form. A few cases, otherwise irreconcilable, can perhaps be solved on the somewhat broader theory of the English Courts, though these decisions can by no means be said to settle the matter.<sup>55</sup> The question is said to be one of fact for the jury.<sup>56</sup> This doctrine, which is perhaps only an extension of the familiar doctrine of *Hochster v. Delatour*<sup>57</sup> and *Frost v. Knight*,<sup>58</sup> is an equitable one, though an obviously hard one to apply. The decisions fail to suggest how one party to the contract will be able to surmise the future intentions of the other party. Moreover, in practice the theory might be dangerous, for no one would be entitled to rescind unless he could persuade the court that his views of his opponent's intentions were correct. Wherever it is adopted the question ought at least to be a question of law for the court and should not be left to the jury. Under these circumstances it may serve to solve contracts which are ambiguous, but it should not be carried further where entirety was intended. It may be added that the rule that failure of one payment will work a forfeiture is the more logical and has the advantage of certainty. In the majority of cases it can work no harm as the instalments are usually equivalent to a fair rent, and the other doctrine savors of a paternal care which the courts ought not to exercise in construing contracts. The vendee should read his contract and failure to do so does not excuse him.<sup>59</sup> It may be added that where it is agreed that payments shall be made in notes, and upon default the goods are retaken, the vendor cannot sue upon them.<sup>60</sup> This is sometimes put on the ground of failure of consideration; but a valid promissory note must be payable unconditionally,<sup>61</sup> and in another case this is given as the reason why the notes cannot be sued upon.<sup>62</sup> The vendor should, it seems, return them to the buyer,<sup>63</sup> and if in the meanwhile he has transferred them, a *bona fide* purchaser will be entitled to

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<sup>55</sup> *Winchester v. Newton*, 2 Allen 492; *Miner v. Bradley*, 22 Pick 459; *Stephenson v. Cady*, 117 Mass. 6.

<sup>56</sup> *Bloomer v. Bernstein*, L. R., 9 C. P. 588.

<sup>57</sup> 2 E. & B. 678.

<sup>58</sup> L. R., 7 Exch. 114.

<sup>59</sup> *Mallon v. Story*, 2 Ed. Smith 331; *Harris v. Story*, 2 Ed. Smith 367; *Ellis v. McCormick*, 1 Hilt 313.

<sup>60</sup> *Minneapolis Harvester Works v. Hally*, 27 Minn.; *Campbell Printing Press Co. v. Henckle*, 19 Dist. of C. 95.

<sup>61</sup> 1 Para. Bills & Notes, 30, 42; *Story, Prom. Notes*, Sec. 22.

<sup>62</sup> 3rd Natl. Bank v. *Armstrong*, 25 Minn. 530.

<sup>63</sup> *Sumer v. Woods*, 67 Ala. 139.

collect them out of the property retaken in preference to the seller.<sup>64</sup>

We now come to the more difficult subject of what will entitle the vendee to rescind, upon default in deliveries. It is submitted that much of the conflict in the decisions will be eliminated if we separate the cases in which there was a failure to pay an instalment from those where the failure was in delivery, recognizing that the two sets of cases have little in common. These cases are more difficult of solution because they are seldom made entire by stipulation, and it is often impossible to place the parties in *statu quo*. If a cross action is the only relief given the vendee will get money instead of the article he wished, and the courts by compelling him to take what he does not want are virtually making a new contract for him. On the other hand, if rescission is allowed cases will arise where the vendee will have taken property without paying for it. It will be necessary to examine a few leading English cases and to trace their influence on American decisions. Before the case of *Boone v. Eyre*<sup>65</sup> it is probable that performance of all the stipulations of a contract on one side was pre-requisite to suit for a breach on the other. But in this case an important and far-reaching change in the law was effected, a view which at first sight seems more equitable being adopted, and it was said that if the covenant broken went only to a part of the consideration and compensation in damages would be an adequate remedy for its breach, then the several covenants could be treated as independent. This is also the doctrine of *Pordage v. Cole*,<sup>66</sup> though in this case the converse is stated to be true, namely, that if the breach cannot be compensated in damages the stipulation must be construed as a condition precedent, a proposition which does not receive the approval of Mr. Parsons.<sup>67</sup> The trouble with these cases, and those which adopt the same view is that the doctrine is very hard to apply and leads to an undesirable divergency in decisions of similar facts. The doctrine seems also to beg the question inasmuch as the breach of any contract *can* be compensated in damages, otherwise the plaintiff would be in equity; but no man wishes to take damages when he has made what he supposes is an entire contract, and on payment of these to be told that he must complete his part. It is debatable, therefore, whether in cases of this sort damages are ever really adequate.

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<sup>64</sup> *Kimball v. Mellon*, 80 Wis. 133.

<sup>65</sup> 1 H. BL. 273.

<sup>66</sup> 1 Wms. Saund. 319.

<sup>67</sup> *Para. on Con.*, Vol. II. xp. 527.

Boone *v.* Eyre, however, has been approved,<sup>68</sup> and doubtless would have remained good law had it not been for the celebrated case of Hoare *v.* Rennie.<sup>69</sup> This case has probably been as much criticised as any single decision in the English reports and is said to have been decided without previous authority. The contract provided that one hundred and fifty tons of iron should be delivered in four monthly installments. During the first month twenty-one tons only were delivered and it was held that the vendee was thereby discharged. It is impossible to reconcile this case with Simpson *v.* Crippin,<sup>70</sup> where it was agreed that from six to eight thousand tons of coal were to be delivered during twelve successive months and the buyer was to supply wagons to receive them. The first month he sent only for one hundred and fifty-eight tons, and yet the seller was held not entitled to rescind. This decision has been criticised as a "strained construction,"<sup>71</sup> and it is said to be applicable only to cases where there is a failure to receive the goods, although the principle is really the same.

It remained for Honck *v.* Muller<sup>72</sup> to cast the weight of authority in England for the doctrine laid down in Hoare *v.* Rennie. In this case failure to accept any of the first instalment of goods was held to discharge the seller. Simpson *v.* Crippin was thus practically overruled though it was distinguished on the ground that the contract had been in part performed and therefore could not be rescinded, it being an elementary principle that the right of rescission cannot be had when the parties cannot be placed in *statu quo*.<sup>73</sup> This does not seem a very logical explanation, however, and Hoare *v.* Rennie has been since approved and may be said to be the law of England,<sup>74</sup> with some modifications which will be noticed later. In America there has been much conflict in the decisions. It is decided by respectable authority that when it is agreed that goods are to be delivered at a specified time the vendee is not bound to take them at a subsequent time,<sup>75</sup> but this is very far from saying that it

<sup>68</sup> Ligget *v.* Smith, 3 Watts 332.

<sup>69</sup> 5 H. and N. 19.

<sup>70</sup> L. R., 8 Q. B. 14.

<sup>71</sup> King Philip Mills *v.* Slater, 12 R. I. 82.

<sup>72</sup> 7 Q. B. D. 92.

<sup>73</sup> 40 N. J. Law 290.

<sup>74</sup> Bradford *v.* Williams, L. R. 7 Exch. 259.

<sup>75</sup> Behn *v.* Burness, 3 Best & S. 757; Bowes *v.* Shand, 2 Ap. Cases 455; Rouse *v.* Lewis, 4 Abb. N. Y. App. 121; Lowber *v.* Bangs, 2 Wall. 728; Davidson *v.* Von Lingen, 113 U. S. 40; Jones *v.* U. S., 96 U. S. 74; Coon *v.* Spalding, 47 Mich. 162.

relieves the purchaser from all the subsequent obligations of the contract.

In Pennsylvania the court holds to the doctrine of *Simpson v. Crippin*, not forgiving the default because it wishes to excuse it, but because in its view to hold these contracts entire is not a proper construction, and therefore the most practicable remedy is by cross action.<sup>76</sup> Mississippi also considers that it is no ground for rescission that a party does not comply with some of the stipulations in a contract if there are other provisions independent of those in which default has been made.<sup>77</sup> Again it is said that such contracts will not be held entire unless the stipulations broken are "made to depend upon the performance of the whole of the covenants in the entire contract."<sup>78</sup> New Jersey holds that these contracts are severable,<sup>79</sup> but the court in this State has gone a little further and has applied the rule heretofore mentioned in regard to failure to make payments, namely, that the vendee would be entitled to rescind if the circumstances of non-delivery were such as to induce a reasonable belief that the vendor did not intend to carry out his contract,<sup>80</sup> and this seems also to be the view taken in New Hampshire.<sup>81</sup> This was held in spite of the fact that Lord Chancellor Selborne expressly says, in *Mersey Steel Co. v. Naylor*, that the rule only applies to the case of a buyer failing to pay. So, also, perhaps, the vendor would be excused from going on with the contract if circumstances render it impossible for the vendee to carry out the contract, as in the case of insolvency, although this has been disputed.<sup>82</sup> This is an uncertain term and the distinctions are finely drawn. The mere fact that the vendee has not money enough in hand to meet his obligations in the ordinary course of business will not in itself constitute insolvency;<sup>83</sup> he must be unable to pay his debts.<sup>84</sup> But insolvency once established, this in itself only relieves the vendor from giving credit, and if the vendee is able to pay the instalments due, would not excuse the vendor.<sup>85</sup> It is probable, how-

<sup>76</sup> *Obermeyer v. Nichols*, 6 Binn. 159; *Morgan v. McKee*, 27 P. F. Smith 228.

<sup>77</sup> *Dunlap v. Petrie*, 35 Miss. 590.

<sup>78</sup> *Hewitt v. Berryman*, 5 Dana (Ky.) 165.

<sup>79</sup> *Gerli v. Poidebard Silk Mfg. Co.*, 31 Atl. Rep. 401.

<sup>80</sup> *Blackburn v. Reilly*, 47 N. J. Law 290.

<sup>81</sup> *Hamer v. Tucker*, 50 N. H.

<sup>82</sup> *N. E. Iron Co. v. Gilbert R. Co.*, 91 N. Y. 153.

<sup>83</sup> *Smith v. Collins*, 94 Ala. 394.

<sup>84</sup> *Cunningham v. Martin*, 125 U. S. 77.

<sup>85</sup> *Pardee v. Kanaday*, 100 N. Y. 121.

ever, that the vendee must pay for future deliveries also to entitle him to a completion of the contract.<sup>86</sup> But the fact that the vendee has given his note will not prevent the vendor from rescinding.<sup>87</sup> And in many States it is held that in case of rescission the vendee must return the articles delivered, or their value.<sup>88</sup> For a long time the weight of authority in America seemed to be in favor of *Simpson v. Crippin*, and this was the view taken by Mr. Benjamin in his work on "Sales."<sup>89</sup> But in Mr. Corbin's edition of this work the contrary is stated. The reason for this opinion is possibly the case of *Norrington v. Wright*,<sup>90</sup> which not only decided that time was of the essence of these contracts, which, as before mentioned, may be regarded as settled by a long line of decisions, but also, in an emphatic opinion, held that failure to deliver the first instalment was a competent ground for rescission. The reasoning of *Hoare v. Rennie* was expressly adopted by the court. While an important decision, it can hardly be said to have exercised much influence in those States which before leaned toward the opposite theory. In New York, however, the doctrine of *Norrington v. Wright* is expressly adopted,<sup>91</sup> and the principle of entirety as early laid down in *Champion v. Rowley*,<sup>92</sup> disapproving the old English case of *Oxendale v. Wetherell*,<sup>93</sup> may be said to be settled law. This later Court of Appeals' decision practically overrules some earlier cases in the lower courts, which seem to lean the other way,<sup>94</sup> and still another case, it is submitted, may be distinguished on the ground that the right of rescission was unwarrantably delayed.<sup>95</sup> This was the law of New York, however, before the case of *Norrington v. Wright*, the case of *Catlin v. Tobias*<sup>96</sup> being a leading authority on the subject. In this case the vendor agreed to deliver a certain number of bottles in instalments for use in the vendee's business, and upon default in

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<sup>86</sup> *Ex parte Chalmers*, L. R., 8 Ch. 289.

<sup>87</sup> *Diem v. Kobletz*, 49 Ohio St. 41.

<sup>88</sup> *Gage v. Mayers*, 59 Mich. 300; *Polhemus v. Holman*, 45 Cal. 573; 6 Houston 421; 36 Mo. App. 567; 59 Wis. 272; 43 Iowa, 339.

<sup>89</sup> *Benj. on Sales*, Sec. 909.

<sup>90</sup> 115 U. S. 188.

<sup>91</sup> *Pope v. Porter*, 102 N. Y. 366.

<sup>92</sup> 18 Wend. 185.

<sup>93</sup> 9 B. & C. 386.

<sup>94</sup> *Snook v. Fries*, 19 Barb. 313; *Lee v. Beebe*, 13 Hun. 89; *Talmage v. White*, 3 J. & S. 218; *Swift v. Opdyke*, 43 Barb. 274. Contra: *Visscher v. Greenbank*, 11 Hun. 159.

<sup>95</sup> *Cahen v. Platt*, 69 N. Y. 349.

<sup>96</sup> 26 N. Y.

delivery it was held that the vendor could not recover for the bottles already delivered. The Court held that under the contract the vendee had the right to use the bottles without waiting to see whether the vendor would complete his contract, and therefore need not return them. The court went further, and held that the same principles would apply even if each month's delivery were regarded as a separate contract. And in a later case it was said that conceding that the contract was severable the vendor must at least make one delivery according to its terms.<sup>97</sup>

Maryland also adopts the view of the New York courts, provided, however, that the vendee give reasonable notice to the vendor of his intention to rescind;<sup>98</sup> and so does Rhode Island;<sup>99</sup> while in Kentucky it was held that performance on one side was a condition precedent unless some benefit was received on one side which it would be inequitable to allow that side to retain.<sup>100</sup> It will be seen, therefore, that it can scarcely be said that the weight of authority is in either direction, but the States take widely diverging views upon the subject. It may be remarked, nevertheless, that the most carefully considered decisions apply the doctrine of entirety as the safer rule in a greater number of cases. Bramwell, L. J., in *Honck v. Muller*, suggests the case of a sale of a suit of clothes, and asks whether, if a coat and vest should be delivered and there should be a default in the delivery of the trousers, the vendee could be compelled to pay for the coat and vest. This is an excellent test of the fairness of the rule. In some States the unfortunate buyer would have to pay for the portion of the suit he had received and spend time looking for a pair of trousers to match; in others, he would be compelled only to return the coat and vest, but supposing it to have become moth-eaten or otherwise spoiled, it would be an open question as to whether he must pay their value; while in the United States courts, New York and a few other States, he could wear the coat and vest without paying a cent for it. It will be seen that none of these rules give an exactly fair result. The chief difficulty which has been suggested in following *Norrington v. Wright* was pointed out by Bramwell, L. J., in *Honck v. Muller*, notwithstanding he was one of the majority of the court in approving *Hoare v. Rennie*. Subsequently he repudiated this

<sup>97</sup> *Nightingale v. Eiseman*, 121 N. Y. 288.

<sup>98</sup> *Bollman v. Burt*, 61 Md. 415.

<sup>99</sup> *King Phillip Mills v. Slater*, *supra*.

<sup>100</sup> *Trimble v. Green*, 3 Dana 357.



dictum in *Mersey Steel Co. v. Naylor*, but the difficulty remains. This occurs where the failure is not in the first delivery but in a second or subsequent delivery. As was said by the New Jersey Court,<sup>101</sup> the delivery of the first instalment does not on principle seem to stand on any different footing from the delivery of any subsequent instalment; and yet if we apply the doctrine of *Hoare v. Rennie* to a second instalment we are running counter to the well-known principle that the right of rescission must not be exercised unless we can restore the parties to their original position.

Most of the cases cited which allow a breach upon a failure to deliver the first instalment can be easily reduced to conformity with the rule already mentioned as in force in New Jersey, that rescission will be allowed only where the default evinces an intention not to carry out the contract. It will be seen that the failure to deliver the first instalment is much more likely to be given this construction than a subsequent default, which would more probably be the result of accident. But it is submitted that any rule of law which compels the vendee, if the default is on a second or subsequent instalment, to return the goods received or their value cannot arise from a true *construction* of these contracts, but from a desire not to impose a forfeiture on the vendor. Such a rule practically says to the vendee, "The vendor has not carried out his part of the contract, but in the interest of fairness we will say that what he has done practically constitutes a contract between you. Although the goods you have received may be of no use to you, although they are not what you contracted for, still you must pay for them, being content to recoup damages for your vendor's failure," thus making a breach of contract in itself a new contract between the parties. The vendee would lose much of the advantage which might be gained by successive deliveries, because he could never be sure they would ever be completed. If he wanted a less quantity he could contract for that amount in the first place in one delivery, making his own contract and not letting the court make one for him; if, on the other hand, he wanted a larger quantity it would seem that to be safe he must order it all at once to be delivered in one instalment. Contracts are made to be kept and not broken, and the courts should be only too willing to adopt a rule which will be an incentive to keep them. Any other rule will permit the vendor to keep a contract if favorable to him or break it if it prove disadvantageous. Such a "con-

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<sup>101</sup> 31 Atl. Rep. 401.

struction" of these contracts as the above is not logical, and it can have no force in a State like New York, where the doctrine of entirety has a firm hold. In this State at least the case of *Catlin v. Tobias* seems to be authority for the view that failure to deliver a second instalment would work a forfeiture equally with a default in the first delivery, and this view is taken by a case in a lower court.<sup>102</sup>

In view of the conflicting decisions and the unfairness of either rule in given cases, a rule is with diffidence suggested for which the writer can cite no authority. Where the contract is for the sale of goods of the like of which there is no dearth on the market upon default in a delivery the vendee should be allowed to make a new contract with another vendor for delivery of the remainder. He should pay the first vendor for what he had delivered, and should be allowed to counterclaim damages for failure to deliver the remainder the measure of which would be the difference in the price of the goods under the new agreement and the old. In cases of this sort such a rule can do no harm. But where the contract is for the delivery of rare and valuable articles, or goods of a particular manufacture or brand, the forfeiture should be enforced, on the principle that "where there has been no beneficial service there shall be no pay."<sup>103</sup> It may very well be that the vendee would have but little use for a lesser quantity of such articles as these and he perhaps could not obtain the remainder of a quality to suit him elsewhere. Certainly, if the rule of *Harmony v. Bingham*<sup>104</sup> is good law, that a vendor is not excused by act of God, he should not be excused under an entire contract where the failure to deliver was due to his own fault.

Where the vendee sues for failure to deliver the vendor may show in reduction of damages that the vendee could have obtained the same goods from others at the same price.<sup>105</sup> This would seem to be in accordance with the first part of the above rule. Or he may show unreasonable delay in exercising the right to rescind.<sup>106</sup> Or he may show a waiver, as the acceptance of a smaller amount,<sup>107</sup> but a waiver of one delivery does not give the buyer the right to carry this waiver over "to the next

<sup>102</sup> *Levene v. Rabbitte*, 2 N. Y. Supp. 389.

<sup>103</sup> *Farnsworth v. Garrard*, 1 Camp. 38.

<sup>104</sup> 1 Duer. 209.

<sup>105</sup> *Saxe v. Penokee Lumber Co.*, 11 Ap. Div. 291.

<sup>106</sup> *Morgan v. McKee*, 77 Pa. 228; *Byers v. Chapin*, 28 Ohio 300.

<sup>107</sup> *Avery v. Wilson*, 81 N. Y. 341; *Silberman v. Fretz*, 12 Ap. Div. 328.

instalment and demand the amount then due together with the deficiency of the preceding instalment." <sup>108</sup> Or he may show that the vendee has prevented performance.<sup>109</sup> Parol evidence may be admitted to show that a written contract of sale has been enlarged and more deliveries provided for.<sup>110</sup> The failure to deliver does not work a forfeiture unless the buyer choose to regard it as terminated,<sup>111</sup> but if he choose to rescind he must do so *in toto*,<sup>112</sup> and unequivocally.<sup>113</sup> When the contract has been rescinded, in those States where the vendor is allowed to recover for what he has already delivered his remedy would be on a *quantum meruit*.<sup>114</sup> If the subject of the sale were animals and, without the knowledge of either party, they were dead at the time of contract, or if merchandise were destroyed by fire under similar circumstances, the sale would be thereby avoided;<sup>115</sup> though if part only were destroyed the buyer would have his option to take the remainder with an abatement of the price.<sup>116</sup> Where nothing was agreed upon as to the time of delivery of the various instalments the question would be one for the court,<sup>117</sup> whether the delivery was made within a reasonable time.<sup>118</sup> If the goods are to be delivered, "as fast as they may be produced," they should be delivered as fast as the operation of the vendor's plant will permit.<sup>119</sup>

It is now proposed to inquire briefly as to where the title to the goods remains in sales by instalments. This is largely a matter of public policy in each State, and the question is one of importance for it is a recognized principle of the law of personal property that no man can be divested of it without his consent.<sup>120</sup> And as is said in Shepherd's "Touchstone":<sup>121</sup> "It is a general rule that when a man hath a thing he may condition with it as

<sup>108</sup> Johnson v. Allen, 78 Ala. 387.

<sup>109</sup> Rouse v. Lewis, 4 Abb. N. Y. App. 121; Young v. Hunter, 6 N. Y. 203; Holmes v. Holmes, 9 N. Y. 525.

<sup>110</sup> Ham v. Cerniglia, 73 Miss. 290.

<sup>111</sup> O'Neill v. James, 43 N. Y. 84.

<sup>112</sup> Raymond v. Barnard, 12 Johnson 274; Hogan v. Weyer, 5 Hill 390; Moyer v. Shoemaker, 5 Barb. 322.

<sup>113</sup> Hunt v. Siger, 1 Daly 209; Ehrensperger v. Anderson, 3 Exch. 158.

<sup>114</sup> Planche v. Colburn, 8 Bing. 14.

<sup>115</sup> Wood & Foster's case, 1 Leon. 42.

<sup>116</sup> 2 Kent Com. 469.

<sup>117</sup> 2 Greenl. 249.

<sup>118</sup> Sawyer v. Hammott, 15 Me. 40.

<sup>119</sup> Stewart v. Marvel, 101 N. Y. 357.

<sup>120</sup> 20 Wend. 275; 1 Hill 303.

<sup>121</sup> Shepherd's Touchstone, 118, 119, 120.

he will. A contract or sale of a chattel personal, as an ox or the like, may be upon condition and the condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that although the same do pass through the hands of an hundred men, yet it is subject to the condition still." This is still substantially the law in Massachusetts and the title to the property remains in the vendor until all the payments are made, and he can follow the property even in the hands of an innocent purchaser.<sup>122</sup> He may retake the goods from his vendee or sub-vendee without notice,<sup>123</sup> or even from an attaching creditor of the vendee.<sup>124</sup> To entitle him to do this the parties must have intended that the title remain in the vendor,<sup>125</sup> and delivery without requiring payment is presumptive evidence of a contrary intention,<sup>126</sup> the burden of proof being on the vendor to show the true intention of the parties.<sup>127</sup> When this intention is evident the vendee gets no title whatever until payments are made, and consequently can give none.<sup>128</sup> The vendor could, therefore, on condition broken, give good title to some new purchaser without actually retaking possession of his property.<sup>129</sup> Nor would a policy of insurance be discharged by such a contract of sale.<sup>130</sup> But before the day mentioned for payment the vendor, it seems, cannot bring trover for the goods.<sup>131</sup> Upon payment the vendee acquires title to the property without further bill of sale,<sup>132</sup> and in Rhode Island it is said that the vendee has such possession that he may sell or mortgage the goods and that upon payment of the last instalment the title of the mortgagee or sub-vendee would defeat an attachment for debt by the original vendor.<sup>133</sup> This same general rule is applied in some other States,<sup>134</sup> but in New Jersey the vendor must not

<sup>122</sup> *Merrill v. Bank of Norfolk*, 19 Pick. 32.

<sup>123</sup> 126 Mass. 482; 103 Mass. 517; 9 Allen 171.

<sup>124</sup> 3 Cush. 257.

<sup>125</sup> *Denney v. Williams*, 5 Allen 3.

<sup>126</sup> 1 Seld. 45; 6 Pick. 266.

<sup>127</sup> *Riddle v. Varnum*, 20 Pick. 283.

<sup>128</sup> *Cogill v. Hartford & N. H. R. R.*, 3 Gray 545; *Deshon v. Bigelow*, 8 Gray 159; *Barrett v. Pritchard*, 2 Pick. 512; *Reed v. Upton*, 10 Pick. 522.

<sup>129</sup> *Hubbard v. Bliss*, 12 Allen, 590.

<sup>130</sup> *Boston & Salem Ice Co. v. Royal Ins. Co.*, 12 Allen 381.

<sup>131</sup> *Newhall v. Kingsbury*, 131 Mass. 445.

<sup>132</sup> *Currier v. Knapp*, 117 Mass. 324; *Chase v. Ingalls*, 122 Mass. 381.

<sup>133</sup> *Carpenter v. Scott*, 13 R. I. 477.

<sup>134</sup> *Sanders v. Keber & Miller*, 28 Ohio St. 630; *Cole v. Berry*, 42 N. J. Law 308; *Tibbetts v. Towle*, 12 Me. 341; 41 Cal. 455; 1 Wis. 141; 16 Mich. 158; 38 Tex. 234; *Bradshaw v. Warner*, 24 Ind. 58.

give the vendee any *indicia* of ownership beyond mere possession or be guilty of conduct which the law would consider fraudulent.<sup>135</sup> This seems to be the law in England,<sup>136</sup> and doubtless the latter part of the rule would hold good everywhere. It is on the ground of constructive fraud that other jurisdictions have refused to allow the title to remain in the seller as against creditors or *bona fide* purchasers from the vendee,<sup>137</sup> and Pennsylvania stands very strongly by this rule. In Illinois they admit that mere possession of goods will not defeat title in the true owner,<sup>138</sup> and that the presumption of title arising from possession of personal property may be overcome,<sup>139</sup> but they refuse to apply this principle to conditional sales and it is well settled that as against creditors or *bona fide* purchasers reservation of title in the original vendor is invalid,<sup>140</sup> and with this view other States agree.<sup>141</sup> In New York a rather untenable and useless distinction is taken between conditional sales and conditional deliveries.<sup>142</sup> In the early case of *Wait v. Green*,<sup>143</sup> it was thought that it would not be public policy to allow the vendor to reserve title against an innocent purchaser. This case was supported by a large number of early decisions.<sup>144</sup> The case was "distinguished" by *Ballard v. Burgett*,<sup>145</sup> and was for all practical purposes overruled, and as this case has been subsequently approved,<sup>146</sup> there is no doubt that in this State the original vendor could retain good title. It is submitted that there is no real distinction between conditional sales and conditional deliveries, but that it arose from the not very praiseworthy desire of the Court of Appeals not to overrule *Wait v. Green*. At any rate the distinction is one which other courts have been unable

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<sup>135</sup> *Marvin Safe Co. v. Norton*, 48 N. J. Law 410.

<sup>136</sup> *Dyer v. Pearson*, 10 Eng. C. L. 20.

<sup>137</sup> *Heryford v. Davis*, 102 U. S. 235; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664; *Copeland v. Bosquet*, 4 Wash. Cir. C. R. 594; *Rose v. Story*, 1 Pa. St. 190; *Haak v. Linderman*, 64 Pa. St. 499; *Martin v. Mathiot*, 14 S. & R. 214.

<sup>138</sup> *Klein v. Siebold*, 89 Ill. 540.

<sup>139</sup> *Fawcett v. Osborn*, 32 Ill. 411.

<sup>140</sup> *Murch v. Wright*, 46 Ill. 487; *Jennings v. Gage*, 13 Ill. 610; *Brundage v. Camp*, 21 Ill. 330; *McCormick v. Hadden*, 37 Ill. 370.

<sup>141</sup> *Vaughn v. Ricketts*, 1874 Ky. Ct. of Appeals; *Gerrish v. Clark*, 64 N. H. 492.

<sup>142</sup> *Comer v. Cunningham*, 77 N. Y. 391; *Dows v. Kidder*, 84 N. Y. 121.

<sup>143</sup> 36 N. Y.

<sup>144</sup> *Smith v. Lyons*, 5 N. Y. 41; 25 Barb. 474.

<sup>145</sup> 40 N. Y.

<sup>146</sup> *Austin v. Dye*, 46 N. Y.

to see. It is suggested that the New York rule is the same as the Massachusetts rule, though probably the courts would be more ready to find grounds of estoppel on the part of the original vendor, for it is stated that "where the owner of property confers upon another an apparent title to or power of disposition over it he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto without knowledge of the claim of the true owner."<sup>147</sup> It is probable, also, that the courts here would be ready to apply the rule laid down in California, that if it may be seen from the entire transaction that the title is to pass, and that the form of sale was only adopted in order to give greater security to the vendor the reservation will be void.<sup>148</sup> It may be added that when the purpose of the sale is that the vendee place the goods again on sale the reservation of title in the original vendor will be void against purchasers.<sup>149</sup> Although in New York it seems that such sales are not void against creditors, they may levy upon the goods in the hands of the vendee, and pay to the vendor the purchase price thereof, and thereby acquire title themselves,<sup>150</sup> though this could not be done after the time for payment had expired.<sup>151</sup> The Massachusetts rule seems to the writer the more logical (and in point of fact the New York rule is practically the same) than the Pennsylvania or Illinois rules. There seems to be no good reason why the rule of *caveat emptor* should not apply in these cases, and certainly following too strictly the doctrine of *Twyne's Case* on which the other rule is based is bound to work injustice in the end. Moreover, there is no justice in making the original vendor give credit when he does not choose to do so. If credit be given the sale passes title,<sup>152</sup> and if the vendor take other security the title to the goods will not remain in him, but the taking of a note is not such security as will pass the title.<sup>153</sup> There does not seem to be much hardship therefore in the case of an innocent purchaser finding that the title was reserved in the vendor and while, as was pointed out by the Connecticut Court, "it is the established policy of our law to hold a man's property subject to

<sup>147</sup> *McNeil v. Tenth National Bank*, 46 N. Y. 325.

<sup>148</sup> *Palmer v. Howard*, 72 Cal. 293.

<sup>149</sup> *Mfg. Co. v. Carmen*, 9 N. E. Rep. 707; *Cole v. Mann*, 62 N. Y. 1.

<sup>150</sup> *Frank v. Batten*, 49 Hun. 91.

<sup>151</sup> *Buckmaster and Smith*, 22 Vt. 203.

<sup>152</sup> *Leonard v. Davis*, 1 Black. 476.

<sup>153</sup> *Campbell Printing Press Co. v. Walker*, 114 N. Y. 7.

the payment of debts, yet \* \* \* a man may appear to have, and in fact, actually have, a valuable interest in property which is beyond the reach of legal process. \* \* \* Should evils spring up under the law as it now is, the Legislature, it is to be presumed, will in due time provide the proper remedy."<sup>154</sup> The statute which is intended to provide for this in New York<sup>155</sup> is a flagrant example of the corrupt and slipshod legislation of this State. Everything is excepted from the statute whose manufacturers desired to continue sales on the instalment plan, and almost every year some new list of articles is excepted, so that now it has almost no application to the law of instalment sales. It may be remarked, also, that the statute does not affect the rights of creditors and protects only subsequent purchasers and mortgagees without notice,<sup>156</sup> and that the remedy required, as pointed out by the Connecticut Court, is wanting. The statute is construed strictly; it would seem that it must be strictly complied with, and in those States where the statute applies to creditors it would protect creditors before the sale as well as after, and even if they had knowledge of its terms.<sup>157</sup> It is well settled that property placed upon realty under a contract that title shall not pass to the vendee will not become a part of the realty.<sup>158</sup> And if goods are to be placed in a deliverable state and payment made as the work progresses the title will not pass.<sup>159</sup>

It is said that the *lex loci* of these contracts should govern,<sup>160</sup> but in New Jersey a Pennsylvania vendor was allowed to reclaim his property in New Jersey, though in his own State he would not have been allowed to do so.<sup>161</sup> This shows that in this class of sales public policy, with its consequent uncertainty, is more apt to govern than settled rules of law.

*Raymond Sanford White.*

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<sup>154</sup> *Hughes v. Kelly*, 40 Conn. 148.

<sup>155</sup> Laws of 1884, Ch. 315; Laws of 1895, Ch. 925; Laws of 1896, Ch. 601.

<sup>156</sup> *Frank v. Batten*, 49 Hun. 91.

<sup>157</sup> *Collins v. Wilhoit*, 108 Mo. 451. Contra: *Morton v. Tuck*, 82 Ga. 230.

<sup>158</sup> 56 Miss. 552.

<sup>159</sup> *Andrews v. Durant*, 11 N. Y. 35.

<sup>160</sup> *Dixon v. Blondin*, 58 Vt. 689; 2 Brawd. 129.

<sup>161</sup> 48 N. J. Law 410.

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THE question of what constitutes being twice in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States, has lately arisen in two notable murder trials and has evoked the expression of diverse views among lawyers as well as laymen. While it is a well-known principle of law that "no person shall be twice put in jeopardy for the same offense," the application of the principle appears to be not always a problem of easy solution.

In the Thorn case there seems to be no justification for the defense to invoke the protection of this rule, and although it was at one time maintained by distinguished lawyers that the breaking down of the first trial was, under this principle of law, a bar to any further proceedings, the weight of opinion now is in harmony with that of the United States Supreme Court, which is, in the words of Mr. Justice Shiras, "that courts of justice are invested with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated, and to order a trial by another jury, and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment of the Constitution of the United States." Leading cases in various state courts of last resort have declared in favor of the same view, and a Georgia case goes so far as to hold that "a trial judge can properly discharge the jury in a murder case on account of the death of the mother of one of the jurors." This is the extreme view, and the chief-justice dissented from his



associates in carrying their conclusion so far. The change of sentiment among lawyers as to the application of the rule is gratifying; now even the counsel for the defense in the case of Thorn do not question the authority of Judge Scott to discharge the whole jury at the illness of one of its members, and to order another trial.

The Luetgert case presents a different aspect. Here the application of the principle in the event of a disagreement of the jury is clouded by much greater diversity of opinion. The courts of several states, Pennsylvania among the number, have held that "if a jury in a capital case is discharged from inability to agree, the prisoner may plead that fact in bar to another trial, yet in Illinois the state's attorney announced his intention to try Luetgert a second time. Whatever one's prejudices as to the innocence or guilt of Luetgert, he cannot but feel that it is on the whole, a beneficial interpretation of the rule that prevents the necessity of a prisoner's making repeated defenses to the same charge. "Better that some guilty escape than that the innocent should be oppressed unduly."

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WITH the retirement this month of Mr. Justice Field a most notable public career comes to an end, the Supreme Court of the United States loses a valued member, and the bench and bar a man whose services to state and nation will never be forgotten. Justice Field is closely identified with the early history of California, where, as chief justice of its highest court, he played a leading part in forming and moulding the legislation and jurisprudence of the state. When the change was made in the constitution of the Supreme Court, the number of its judges being increased to nine, Justice Field was offered one of the new positions by President Lincoln; a Democrat appointed by a Republican. During the remainder of the war, and in the troublous times that followed, familiarly known as the Reconstruction Period, in the decisions of the many momentous questions, Justice Field's voice was constantly heard, and declining years seem to have diminished his energy but little. His opinions have been characterized by that clearness and vigor of style, depth of thought and logical treatment of the subjects discussed, which in the judgment of his best qualified critics, distinguish him as one of the ablest members of the high tribunal with which he has been so long identified.

It is interesting to note that coincident with the retirement of Justice Field in this country is announced that of an eminent

English jurist. Lord Esper, whose long career in the Court of Appeals, as Master of the Rolls, has just closed, leaves behind a record which will add to the glory of English law. The departure from active life of two such men is just cause for sadness and for regret that the hand of Time cannot be turned back, to the end that others may continue to enjoy the fruits of labors which these men have shown themselves so well able to perform.

## COMMENT.

By the provisions of the Civil Service Law the President, with the assistance of the Civil Service Commissioners, is required to prepare suitable rules for carrying the law into effect. Whether these rules when so promulgated become a part of the law itself and consequently enforceable by the courts, or whether they remain merely rules of the Executive to his subordinates expressing his wishes as to their conduct and so enforceable only by him, may be a matter of doubt. At any rate, three of the United States Circuit Courts have, within a few weeks of each other, come to different conclusions.

On precisely the same statement of facts Judge Jackson in *West Virginia* adopts one view in *Priddie v. Thompson*, 82 Fed. 186, and Judge Baker in *Indiana* adopts the other in *Taylor v. Kercheval*, 82 Fed. 497. By Act of May 21, 1896, office deputy marshals may be appointed by the marshal after recommendation of the deputy to the Attorney-General and approval thereof by him. Nothing is said about the deputy's tenure of office or the marshal's power of removal. By rule of the President office deputy marshals were brought under the classified civil service. Both Priddie and Taylor were sought to be removed by the successors of the marshals who appointed them and both applied for injunctions, claiming the benefit of the Civil Service Law and a rule of the President forbidding dismissal except for just cause other than political or religious opinions.

Judge Jackson, relying on High. Inj., 2d ed., sec. 1315, and *Guilloth v. Poincy*, 6 So. Rep. (La.) 507, held that it was Congress' intention in passing the Civil Service Act to restrain the exercise of the power of removal by the appointing officer, otherwise it was mere *brutum fulmen*; that the rules of the President, when announced, become as much the law of the land, as the Act itself; that therefore Priddie had a right to enjoy the office during good behavior, *i. e.*, he had a vested interest therein; and that consequently there must be some protecting remedy, namely, injunction, the only remedy which is applicable. Judge Baker, after showing that the jurisdiction of equity courts covers only matters of property and the maintenance of civil rights, and never matters of an executive or political nature, states what seems to us to be the true principle—that in no sense has an office holder any property right in his office, otherwise he could never be removed. The marshal's power of removal is incident to his power of appointment (*Parsons v. U. S.*, 167 U. S. 324), and no court can interfere with his action, as it is necessarily an act of discretion. Nor can any rule of the President or the Commission, as

neither have legislative powers either originally or by delegation, change the law. Only in the sense that acts done under them are upheld may they have the force of law; any transgression will render the transgressor liable only to the executive power, not to the law and the courts (*U. S. v. Eaton*, 144 U. S. 677). In *Carr v. Gordon*, 82 Fed. 373, Judge Jenkins of Illinois came to the same conclusion as Judge Baker, where the facts were that the Postmaster of Chicago had transferred the superintendent of a sub-station, who was under the Civil Service Law, to a lower position in the delivery department at a lower salary, without preferring any charges against him or giving any opportunity for defense.

Within the last few years an evil has arisen which threatens to increase to such an extent as to almost overwhelm the treasuries of some of the smaller States. This is the employment of expert witnesses, notably physicians, to give opinion-evidence, and the payment of exorbitant prices therefor. In the majority of large murder trials, which seem to have furnished the market for such evidence, the accused is unable financially to employ counsel, who are thereupon supplied at the expense of the State. These counsel generally demand the employment of expert witnesses, whom it also devolves upon the State to pay. This custom has greatly increased the expenses of the States. Therefore, any method tending to decrease such expenditures will be welcomed. The Supreme Court of Illinois, following the lead of Alabama, in the case of *ex parte Dement*, 53 Ala. 389, and several other States, has decided in *Dixon v. People*, 48 N. E. Rep. 108, that a physician, subpoenaed as an expert witness only, without knowledge of the particular facts of the case, may be compelled to testify without extra compensation beyond that allowed to witnesses by statute. A physician was here asked a hypothetical question, and refused to answer without additional compensation; whereupon he was fined for contempt, and his appeal from such judgment was not sustained. The case differs from *Wright v. People*, 112 Ill. 540, where the witness had visited a patient professionally, and had voluntarily given part of the testimony desired.

In England, fees paid to witnesses are regulated by the profession or calling of such witness; but such a rule has never prevailed in this country. Three grounds are here given, however, why extra compensation should be paid. The first, that the time of an expert witness is more valuable than that of an ordinary one, has of late years been repeatedly denied. Another reason put forward is that the skill and knowledge of an expert are his own property, and cannot be taken without due compensation. But it is here decided that such skill and knowledge are property only when applied in effecting some cure; not when answering a question put upon trial, unless they require special preparation or work. The third reason is one depending

entirely on statute. The fact that States of such eminence as Illinois and Alabama have arrived at this decision may, if followed by the courts of other States, as it seems it should be, offer a means of escape to the State from exorbitant witness fees of experts, by subpoenaing and compelling them to testify at the ordinary fee.

A new court rule recently announced by Judge Grosscup of the United States Circuit Court (Chicago), which we quote from the *Albany Law Journal*, will heartily commend itself to the profession. The rule, which is directed against that class of so-called "poor person" litigants, who bring personal-injury suits and escape paying or securing costs by making a "poor person" affidavit, is as follows: "Hereafter the plaintiff filing such affidavit and his counsel of record will sign a stipulation to the effect that no agreement has been entered into between them guaranteeing the counsel a division of the judgment, and that no such assignment shall be made to the final disposition of the suit either here or in the higher courts, if appealed. The stipulation shall further provide that when judgment is finally obtained, and the money is paid into court, it shall remain in the hands of the clerk, and be disposed of under the order of the court. First, the costs shall be paid. Then the attorney shall receive for his service a fee determined in size by the judgment of the court. The rest shall go in cash to the plaintiff."

Generally such litigation is purely speculative on the part of the plaintiff's attorney. The plaintiff is largely under the lawyer's power while entering into the agreement with him, as the best class of lawyers will not touch such cases. In one case which has fallen under our notice the injured party was to have 50 per cent of the amount recovered. But when the lawyer found that the corporation was willing to settle for a much larger amount than he had anticipated, he made a new agreement giving his victim only 25 per cent. On the discovery of the facts by another attorney, who was later interested in the case, the first lawyer would have been disbarred had he not refunded all but a reasonable compensation for his services. Such a rule by taking the plaintiff under the court's protection, will do much to discourage the really remarkable activity of these "ambulance chasers," as they are commonly known in New York.

## RECENT CASES.

## CRIMINAL LAW.

*Betting on Election.*—*Rich v. State*, 42 S. W. Rep. 291 (Tex.). Defendant proposed to bet \$25 on an election and the other party to the bet put up \$5, agreeing that they should be forfeited if the remaining \$20 were not put up within a specified time. The \$5 were forfeited to the defendant. *Held*, that such action did not constitute a betting on an election. "A bet is a wager and the betting is complete when the offer to bet is accepted" (*State v. Welch*, 7 Port. 465).

*Indictment—Abatement—Presence of Stenographer in Grand Jury Room.*—*State v. Bates, et al.*, 48 N. E. Rep. 2 (Ind.). The mere presence of a stenographer at the examination of witnesses before a grand jury, for the purpose of taking evidence on which the indictment is to be founded, furnishes no ground for abating the indictment, unless accused has been prejudiced thereby. The statute (sec. 1724, Burns' Rev. St., 1894) expressly gives the grand jury the right to appoint one of their own number to take down the evidence given before them, and preserve it for use in the prosecution. But there is no statute authorizing any other person to remain in the room and take the evidence in short hand, nor any statute prohibiting it. In the federal courts, which also are subject to no such statute, the presence of a stenographer does not invalidate the indictment (*U. S. v. Simmons*, 46 Fed. 65; also, *Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335). In *State v. Clough*, 49 Me., on p. 576, the court said: "The mere fact that a stenographer was present when an indictment was found would not render it void." But see contra, *State v. Bowman*, 38 Atl. 331, a Maine case, reported on page 91, Vol. VII., No. 2, YALE LAW JOURNAL.

*Invalidity of Sentence—Omission of Hard Labor—Habeas Corpus—Extent of Relief Granted.*—*In re Christian*, 82 Fed. Rep. 199. Petitioner had been convicted under Section 5392 of the Revised Statutes of the United States, which imposed as a penalty fine and imprisonment at hard labor, and was sentenced to pay a fine and to imprisonment, "hard labor" being omitted from the sentence. *Held*, that petitioner should be released on habeas corpus, but without prejudice to the right of the United States to have him properly re-sentenced, even though he had partly satisfied the sentence by payment of the fine. In *Harman v. U. S.*, 50 Fed. 922, Caldwell, J., said: "It seems probable that if the plaintiff had sought relief from the void sentence, after suffering part of the punishment, by habeas corpus, his discharge would have been absolute and final." See *Ex parte Lange*, 18 Wall. 163; *In re Johnson*, 46 Fed. 477. This dictum seems to be disproved in *In re Bonner*, 154 U. S. 243, 14 Sup. Ct. 323. Other cases are *Medley, Petitioner*, 134 U. S. 175, 10 Sup. Ct. 384; *Savage, Petitioner*, 134 U. S. 176, 10 Sup. Ct. 389; also, *Ex parte Friday*, 43 Fed. 916.

*View by Jury—Conversation with Passer-by.*—*State v. Perry*, 27 S. E. Rep. 997 (N. C.). *Held*, that although the fact that the jury, without leave of

the court, went to view the scene of the crime, may not be ground for a new trial; yet a new trial will be granted because, while so doing, they interrogated a passer-by as to the identity of a certain house, whose distance from the scene of the crime was material. There is a difference of opinion between the authorities as to whether the prisoner must accompany the jury in their inspection of the premises ("Thomp. Trials," sections 886, 887); but all concur that evidence cannot be taken on such occasions. The settled practice is for the court to appoint "showers," but merely for the purpose of pointing out the locality ("Thomp. Trials," sec. 914; "Bailey, Proc." 228; *State v. Lopez*, 15 Nev. 407). While there is conflict upon the point, it has been held, as in *People v. Hope*, 62 Cal. 291, that the bare fact of the jury having visited the scene of a capital offense, with the trial of which they are charged, though made without leave of the court, is not *per se* ground for a new trial. Some prejudice must appear, as in the present case. *State v. Tilghman*, 33 N. C. 513.

*Aggravated Assault—Instructions to the Jury.*—*Grayson v. State*, 42 S. W. Rep. 293 (Tex.). A jury was charged that if the evidence tended to show that the assault was made with premeditated design, and by the use of means calculated to inflict great bodily injury, the defendant was guilty of an aggravated assault. *Held*, erroneous. An assault and battery, to become aggravated, must result in serious bodily injury or such an injury as is attended with danger.

*Burglary—Allegation in Indictment as to the Ownership of Property.*—*Lamater v. State*, 42 S. W. Rep. 304 (Tex.). In an indictment for burglary it was alleged that an entry was made into a school building with intent to steal certain property belonging to the janitor of the building. The court charged the jury that, "A person who is in the direct control of a house, and exclusive management and control of property, is, for the purposes of law, the occupant of such house and owner of such property." *Held*, such charge was authorized, notwithstanding the general property was shown to be in the pupils'.

## CARRIERS.

*Connecting Carriers—Duties—Limitation of Liability—Through Shipments.*—*Bird et al. v. Southern R'y Co.*, 42 S. W. Rep. 451 (Tenn.). Plaintiff consigned a box of fruit trees to a place by a route covering parts of three connecting and distinct lines of railway. When the intermediate carrier delivered the trees to the ultimate carrier, the latter immediately informed the intermediate carrier that the destination was a prepay station and that they would not forward the trees until all charges were paid. Thereupon the intermediate carrier took no action for eighteen days, as a consequence of which the trees became worthless. Intermediate carrier held liable. An intermediate carrier is entitled to any exemption contained in a bill of lading issued by the initial carrier, *Halliday v. R'y Co.*, 70 Mo. 159; but such exemption does not relieve him from responsibility for his own negligence. The intermediate carrier was charged with a duty to inform either the shippers or the initial carrier that the destination was a prepay station and in not doing so was guilty of negligence.

*Carriers—Who are Passengers.*—*McNulty v. Penn. R. R. Co.*, 38 Atl. Rep. 524 (Penn.). Plaintiff's husband contracted with the defendant company to do certain work upon a bridge on its line of railway, the company agreeing to pay him \$1.20 per day and to transport him to and from his home to the

place where the work was to be performed. While being thus transported he was killed by a freight train crashing into the rear of the passenger car in which he was riding. *Held*, in an action by the plaintiff to recover for the death of her husband, that when the deceased entered the train for carriage he ceased to be an employee, but, under the contract, became a passenger. Consequently the rule regarding co-employee did not apply and therefore the negligence of the engineer of the freight train in causing the collision did not relieve the company. But see *Baltimore & P. R. Co. v. Jones*, 75 U. S. 439, Chase's Cases on Torts, p. 223.

*Carriage by Sea—Exceptions in Contract—Negligence—Jettison of Cattle.—Compaina de Navigacion La Flecha v. Brauer et al.*, 18 Sup. Ct. Rep. 12. In an action in admiralty against a steam navigation company, it appeared that a certain number of cattle were received under a bill of lading stipulating that they were to be "at owner's risk; steamer not to be held liable for accident to or mortality of the animals, from whatever cause arising." During the trip the vessel encountered some rough weather and the master and crew, becoming panic-stricken, drove overboard 126 head of cattle. Such action appearing from the testimony to be unnecessary and due to the incompetency of the crew, *held*, that there could be a recovery. The ordinary contract of a common carrier by sea involves an obligation on his part to use due care and skill in navigating the vessel and in carrying the goods. An exception, in a bill of lading, of perils of the sea, or other specified perils, does not excuse him from that obligation, nor exempt him from one of those perils, to which the negligence of himself or his servants has contributed. *N. J. Steam Nav. Co., v. Merchants Bk*, 6 How. 344. *Transportation Co. v. Downer*, 11 Wall. 129. A similar English case is that of *Lenro v. Dudgeon*, 17 Law T. (N. S.) 145.

## CONTRACTS.

*Landlord and Tenant—Coal Leases—Interpretation—Liability of Lessee for Royalty.—Wright et al. v. Warrior Run Coal Co.*, 38 Atl. Rep. 491 (Pa.). Plaintiff leased to defendants certain coal lands. The lease provided for the payment of a royalty of fifteen cents per ton for all coals mined above the size of chestnut coal, seven and one-half cents for the chestnut, and nothing on the smaller sizes. At the time of the making of the contract there were mined and marketed in that locality seven sizes of coal, including the chestnut. Of the total amount produced, fifteen per cent. was chestnut and nine per cent. smaller, both of which were the incidental product of preparing the other sizes. The demand was greatest for the larger sizes, and very slight for the chestnut. After a few years the demand for the larger sizes diminished, and for the smaller sizes increased to such an extent that it became profitable to produce a greater proportion of smaller coal. In preparing this by breaking up the larger sizes a greater proportion of chestnut and smaller coal was necessarily produced, which also found a profitable market. In an action by the plaintiffs to recover a royalty on the increased production of the chestnut and smaller sizes, the court held that for all chestnut above fifteen per cent, and smaller coal above nine per cent, the average of each produced at the creation of the contract, the lessee should pay a royalty of fifteen cents per ton. Mitchell, J., (dissenting) held the royalty should not be allowed, inasmuch as it was in effect "making a new contract for the parties, in the light of subse-



quent events, in place of the one they made for themselves." In his opinion the lessees could have reduced the whole production of the mines to the smallest size on which the full royalty was paid, and still not be liable for an increased royalty on the incidental product.

*Note to Joint Payees—Transfer of Interest—Liability.—Bond v. Holloway*, 47 N. E. Rep. 838 (Ind.). Defendant, one of two joint payees of a negotiable note, by a writing on the back thereof, assigned over his interest to his co-payee, who in turn sold the note to plaintiff's decedent. *Held*, that the assignment was a mere transfer of assignor's interest, and not an unrestricted and unqualified indorsement. The case appears to be a novel one, and no decisions directly in point are cited. The common law rule that where two persons, not partners, were payees of a promissory note, an indorsement by both was necessary to pass title (2 Pars. Bills and N. 4) has been modified in many jurisdictions to the effect that a part of a written contract may be assigned. *Grover v. Ruby*, 24 Ind. 418; 2 Story Eq. Jur., §1044. But such assignment has nowhere been held to be an unqualified indorsement. On the contrary, it has been held in such a case that the co-payee, or his assignee, cannot maintain an action on the assignment as an indorsement. 1 Daniel Neg. Inst. p. 629; *Carrick v. Vickey*, 2 Doug. 653, note; *Foster v. Hill*, 36 N. H. 526; Chit. Bills 57. In Michigan the negotiable character of a promissory note is destroyed by an indorsement by a payee transferring only his interest to another. *Amiba v. Yeomans*, 39 Mich. 171. But see *Vincent v. Horlick*, 1 Camp. 442; *Hailey v. Falconer*, 32 Ala. 536; *Lyman v. Clark* Mass. 235; *Rich v. Lord*, 18 Pick. 325. In the present case the language of the assignment shows only an intention to transfer defendant's interest in the note, and is not an indorsement which charged him as indorser under the law merchant. This fact being patent upon the face of the writing, all subsequent purchasers were chargeable with notice thereof.

*Beneficial Associations—Change of Beneficiary.—Fischer v. Fischer*, 42 S. W. Rep. 448 (Tenn.). A beneficiary in a life insurance policy paid the assessments on the policy for several years. The insured then caused the policy to read in favor of another beneficiary in his place. *Held*, such action was permissible when not in violation of the by-laws of the company. The rights of the holder and beneficiary are to be found in the laws of the company or order, and no interest does or can rest in a beneficiary so as to defeat this right.

## DIVORCE.

*Decree—Prohibition of Use of Husband's Name—Injunction.—Blanc v. Blanc*, 47 N. Y. Sup. 694. A decree granting a divorce between husband and wife, which also provided that the defendant should be prohibited from using her husband's name, or any part of it, cannot be attacked collaterally in a suit between the same parties on the ground of want of jurisdiction of the court to decree such a prohibition. Such a decree is valid, and where the wife subsequently uses her husband's name for theatrical purposes, though not in private life, she may be fined for contempt of court, though she used the name under advice of counsel. Where the decree of divorce is still in effect, an injunction restraining the divorced wife from using her former husband's name, will be denied as unnecessary.

*Subsequent Award of Alimony—Jurisdiction—Effect of Marriage of Defendant.*—*Hekking v. Pfaff*, 82 Fed. Rep. 403. Plaintiff, a resident of South Dakota, had obtained a decree of divorce in the courts of that State against defendant, a resident of Massachusetts and not under the jurisdiction of the court granting the divorce. No alimony was allowed by this decree. Defendant thereafter married again, and plaintiff subsequently obtained leave to have the decree opened, and filed an amended bill alleging grounds for alimony that had arisen since the original decree. In an action brought on a decree thereby obtained granting alimony, *held*, that the latter decree was void, and that defendant's subsequent marriage did not prevent him, either as a ratification, waiver or estoppel, from denying the jurisdiction or authority of the court to open the decree and award alimony against him.

# CIVIL RIGHTS.

*Civil Rights—Restaurant Keepers—Colored Guests—Master and Servant.*—*Bryan v. Adler*, 72 N. W. 368 (Wis.). A Wisconsin statute makes restaurant keepers liable to the person aggrieved, for refusal, or aiding or inciting a refusal to anyone of every race and color, the full enjoyment and privileges of their restaurant. Under such a statute, a restaurant keeper is liable to a colored guest whom the waiter refused to serve on account of his color, even though the restaurant keeper did not aid nor incite the refusal, but had in fact commanded the waiter to serve the guest and had afterward discharged him for the refusal. It is well settled that a master is liable for an injury done by a servant, whether through negligence or malice, when engaged in the discharge of a duty which the master owes to the person injured. *Croker v. Railway Co.*, 36 Wis. 657. Compensatory damages may be recovered without the master ratifying the act. *Spalding v. Railway Co.*, 33 Wis. 582; but it is otherwise if exemplary damages are sought to be recovered. *Bass v. Railway Co.*, 39 Wis. 636.

*Racing Association—Rules of Jockey Club—Reasonableness—Amusements.*—*Grannan v. Westchester Racing Ass'n*, 47 N. E. Rep. 896 (N. Y.). Defendant had ruled plaintiff off the turf and excluded him from attendance at a subsequent race, for which he had purchased a ticket, because of a bribe offered by him to jockeys in a race, in violation of a rule of the jockey club, declaring such act a dishonest practice and violation of its rules. Defendant was an association organized under Ch. 570, Laws 1895, which licensed it to conduct races for a stake upon condition that all running race meetings should be conducted by it subject to the reasonable rules of the jockey club. *Held*, that the rule in question is not unreasonable; is not a restriction upon the rights of the public in a franchise enjoyed by the association; violates no contract, takes away no property, and interferes with no vested right. Also, that the exclusion of an offender is not limited to the particular day on which the offense occurred, and that such exclusion is not violative of Laws 1895, c. 1042, relating to the equal rights of all persons at places of amusement, etc. Compare *Civil Rights Cases* 109 U. S. 3, 3 Sup. Ct. 18.

# MISCELLANEOUS.

*Corporations—Appropriation of Assets—Individual Indebtedness.*—*Mt. Verd Mills Co. v. McElwee*, 42 S. W. Rep. 465 (Tenn.). Defendant received from his brother, the secretary and treasurer of an incorporated com-

pany, several small checks in settlement of his (the secretary's) indebtedness, and drawn in his official capacity. The checks were charged to defendant and the company sued to recover value. *Held*, defendant was liable. The rule that one partner cannot give a partnership check without the assent of the other partners, in payment of his individual debt, as found in *Rogers v. Betterton*, 93 Tenn. 630, 27 S. W. 1017, applies in this case.

*Negligence of Attorney—Liability—Measure of Damages.*—*Fay v. McGuire, et al.*, 47 N. Y. Supp. 286. The defendants, who were attorneys, represented to plaintiff, their client, that a mortgage which they had obtained for him upon certain property was a first lien. Plaintiff foreclosed and took a purchase-money mortgage from the purchaser. The purchaser subsequently made a contract to sell the property, but could not until he had paid certain prior incumbrances and liens on the property, which the defendants had not discovered. He claimed, and the plaintiff paid him half the sum expended in clearing the property. *Held*, that defendants were liable to the plaintiff, who was entitled to be put as nearly as possible in the position which he would have occupied if his mortgage had been a first lien. The measure of damages was the sum paid in removing prior incumbrances.

*Copyright—Subjects of Copyright—Price Catalogue.*—*J. L. Mott Iron Works v. Clow et al.*, 82 Fed. 316. Plaintiffs, who were manufacturers of plumbers' supplies, had issued an illustrated catalogue of their wares, which was largely copied by defendants, a rival concern. *Held*, that an injunction would not lie to restrain defendants from further publication of their catalogue, as the original cuts were of articles which could not be the subject of artistic treatment, and the letter-press was confined to a description of the wares, and of no artistic merit, and hence not entitled to be copyrighted. The object of the constitutional provision is to promote the dissemination of learning by protecting works which promote general knowledge in science and useful arts. It is not intended as a protection to traders in the particular manner in which they may shout their wares. In *Hotten v. Arthur*, 1 Hem. & M. 603, the court ruled in favor of the copyright of a catalogue of curious books, not on the ground that it was an advertisement, but that it contained original matter. But in *Cobbett v. Woodward*, L. R., 14 Eq. 407, an injunction was denied where the catalogue infringed contained engravings of furniture, with remarks of description. This case was flatly overruled in *Maple & Co. v. Junior Army & Navy Stores*, 21 Ch. Div. 369. The Supreme Court of the United States, however, has expressly approved of *Cobbett v. Woodward*, *supra*. See *Baker v. Selden*, 101 U. S. 99, 105; *Clayton v. Stone*, 2 Paine 382, Fed. Cas. 2872. See, also, *Jeweler's Mercantile Agency v. Rothschild*, 39 N. Y. Supp. 700, reported in Vol. VI., No 1, of the YALE LAW JOURNAL.

*Auction—Representations—Description of Incumbrance.*—*Blanch v. Sadler*, 47 N. E. Rep. 920 (N. Y.). Plaintiff purchased premises, at a public auction, which were stated to be subject to a mortgage of a certain amount, at a certain rate of interest and having a certain time to run. No further representations as to the terms of the mortgage were made at the time. On subsequently looking up the title plaintiff discovered a clause securing payment of the mortgage in gold coin, "of the present standard of weight and fineness." *Held*, two judges dissenting, that this clause did not constitute such a variance from the incumbrance described as to justify purchaser in rejecting the title. He was notified of the existence of the mortgage, but made no inquiry as to

whether it contained special terms. In view of the fact that the government is pledged to maintain the parity of treasury notes and silver and gold coin, it cannot be assumed, that if the contract is completed any additional burden will be imposed upon the plaintiff by this clause. The dissenting opinion maintains that a contract to pay for property, or the taking subject to an obligation, are assumed to be dischargeable in any kind of legal tender (*Juilliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. 122). The sale in the present case was at the Real Estate Exchange, which is attended by a large number of bidders. If it was intended to sell the property subject to a mortgage not payable in legal tender, it should have been so stated in the terms of sale. Any other rule would compel bidders to search titles before they could safely bid at the exchange.

*Action for Fraud—Evidence—Competency—Declaration Showing Intent.*—*Zimmerman v. Brannon*, 72 N. W. Rep. 439 (Iowa). Statements by defendants as to the condition of a lot of hogs they were attempting to sell, made to former prospective purchasers, may be shown by plaintiff, a subsequent purchaser, in an action alleging fraud in the sale of the hogs, as evidence of the seller's intent in making representations to him. And when defendants falsely stated that the hogs came from one stock-yard, when in fact they came from another where there had been hog cholera, it may be shown in an action for fraud as evidence of the defendant's knowledge of the condition of the hogs.

*Navigable Waters—Bridges—Eminent Domain.*—*U. S. v. City of Moline*, 82 Fed. Rep. 592. Congress may assume jurisdiction over a navigable river lying wholly in one State, and may order obstructions to navigation therein removed, even though these obstructions have been authorized by the State. This right does not *per se* exempt the government of the United States from the duty of making just compensation for such property rights as are taken. *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622. But a stipulation in the grant of a franchise to maintain a toll bridge over such river, that the legislature may at some future time direct a draw to be placed in the bridge, implies that the change shall be made without compensation by the State, and inures to the benefit of the United States, once Congress has declared the river within its jurisdiction.

*Estates in Expectancy—Grant—Agreement to Convey—Consideration—Family Settlement.*—*In re Lennig's Estate*, 38 Atl. Rep. 466 (Pa.). Decedent left a will wherein she bequeathed her whole estate to a daughter and two granddaughters. Appellant, a son of decedent, claims one-third of the fund as trustee for his children, by virtue of a paper duly executed by the three legatees during the life of testatrix, the contents of the will being known to all parties at the time. This paper was in effect an agreement that the fund should be divided into three parts, one part to go to the daughter, another to the two granddaughters, the third to appellant as trustee. *Held*, that an estate in expectancy is not the subject of a grant, and that an agreement to convey such estate is not enforceable as a contract, in the absence of a valuable consideration. The agreement in the present case is not such valuable consideration, as being a family settlement, there being no controversy, or dispute, or adverse title. Neither did the agreement of appellant with legatees that he or his children would not further solicit testatrix to make a testamentary disposition in their favor constitute such valuable consideration.

## BOOK NOTICES.

*Carriers of Passengers.* By Norman Fetter. Two volumes. Law Sheep, pages xxviii., 1693, West Publishing Company, St. Paul, Minn., 1897.

While this treatise is not issued in the Hornbook Series, the features there so successfully carried out have been retained. This method is strikingly illustrative of the development of the law of carriers by the courts. Starting with well-settled common law principles, it has been the duty of the judges to apply and often to stretch these rules to fit the wholly new conditions which have arisen in this century. Mr. Fetter has adapted his treatment to this development. The chapters on the liability of the carrier for the acts of its servants are especially interesting in this light, showing as they do the close return to the early idea of absolute responsibility in this the latest application of the doctrine. No attempt is made to go into the strictly corporation law of railroads. The cases discussed are smoothly and logically connected relieving the book of any appearance of legal patchwork. The words of the judges are often quoted, a feature which will afford ready help to the brief-maker.

*Fraudulent Conveyances and Creditors' Bills.* By Frederick S. Wait of the New York Bar. Law Sheep, pages lxvii., 834. Baker, Voorhis & Company, New York, 1897.

The avowed object of this work is to make the way of the fraudulent creditor hard. To accomplish this the entire subject is gone over from the time of the Statutes of Elizabeth and Twyne's case, and the substantive as well as adjective side of the law fully explained. Recent favors shown to the debtor, such as freedom from imprisonment for debt, have made him bolder in evading his responsibility. The cost of this reform must be borne by some class of persons, and at present creditors are paying the price. It has been the author's purpose "to elucidate the principles of law affecting conveyances made by debtors in fraud of creditors, both in this country and in England, to collate the authorities, and to point out the practical methods by which such collusive trusts can be successfully exposed and unravelled, the property regained for creditors, and the prevalent modern tendency of debtors to hinder, delay and defraud their creditors, by colorable transfers and secret trusts, correspondingly suppressed." The typographical work is of the best. The print is large and clear, the lines are well leaded, and the side headings are distinct. It is a pleasure to turn the pages, and admire them as a production of the printer's art.

*A Manual of Medical Jurisprudence.* By Alfred S. Taylor, edited by Clark Bell, Esq., of the New York Bar. Cloth, pages xvi., 832. Lea Brothers & Co., New York and Philadelphia, 1897.

This is the twelfth American edition of this work, long a standard one. Important advances in the subject have been made since the last edition, the results of which are incorporated in this. A somewhat desultory chapter on Medico-Legal Surgery has been added. It seems strange that in such a well-known treatise the reader should look in vain for an adequate discussion of traumatic neuroses, and of the nervous system in general. The increasing frequency of suits for damages resulting from such injuries makes their discussion indispensable both to the lawyer and the expert. On those topics which most frequently arise in criminal cases, especially that of insanity, the treatment is full and complete. Professor M. C. White of this University has furnished material for the chapter on the Microscope and the Red-Blood Corpuscle.

## MAGAZINE NOTICES.

The following are some leading articles which have appeared in legal publications during the last month:

*Albany Law Journal:*

- Nov.* 6. The Term Quasi-Contract, . . . Alexander Hirschberg.  
 13. The First Term of the Supreme Court in Western  
 New York, . . . L. B. Proctor.  
 20. Legal Status of Women in France, England and  
 the United States. . . P. L. Edwards.  
*Dec.* 4. No Poll Tax for Voters, . . . D. B. Hill.

*Central Law Journal:*

- Nov.* 5. Secondary Evidence—Where Written Instrument  
 is out of the Jurisdiction, . . . J. C. Fitnam.  
 12. Possession of Stolen Property as Evidence of  
 Guilt, . . . L. B. Ewbank.  
 19. The Submission and Adoption of Constitutional  
 Amendments, . . . H. Z. Johnson.  
 26. The Incontestable Clause in a Life Insurance  
 Policy, . . . Jacob Fehr, Jr.  
*Dec.* 3. The Law of Hawkers and Peddlers, . . . George Lawyer

*Green Bag—November.*

- Chapters in the English Law of Lunacy—Moral  
 Insanity, . . . A. W. Renton.  
 —December.  
 Chapters in the English Law of Lunacy—Marriage, A. W. Renton.

*New Jersey Law Journal—November:*

- Woman's Legal Status—Should it be Altered, . . . Mary Philbrook.

*Harvard Law Review—December:*

- Discovery Under the Judicature Acts, II., . . . C. C. Langdell.  
 The Judicial Use of Torture, I., . . . A. L. Lowell.  
 Arbitration as a Condition Precedent, . . . A. C. Burnham.  
 Restitution or Unjust Enrichment . . . Learned Hand.

*Virginia Law Register—December:*

- Government by Injunction, . . . W. G. Peterkin.

# YALE LAW JOURNAL

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## LEGAL TONIC.

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The last Federal census showed an alarming increase of homicide in the United States in the decade of 1880-90, and unofficial figures seem to show, as might have been expected from financial conditions, a still greater per cent of increase during the past five years. This increase is not local, but general, and therefore the more alarming. This phenomenon has attracted particular attention in the South, not because the percentage of increase is greater here than elsewhere, but because it seems strange that crimes of violence should be more frequent under the home-rule of the white people of the Southern States thirty years after emancipation than during the troublous dozen years of social, industrial and political transformation immediately following the Civil War, when society was adjusting itself to changed conditions under ignorant negro domination and corrupt carpet-bag governments. In some of the States of the old Confederacy the Governors have called special attention of legislators and people to this homicidal epidemic; and, in one of them, a good bishop has set apart a particular Sunday for suitable services and sermons in the churches of his own communion, and invited the ministers of all denominations to unite with his own on that day in calling public attention to this perilous social condition and arousing all the moral forces of the State in a joint effort to suppress the spirit of violence and bloodshed sweeping over the State. Magazines and journals are doing similar service in other portions of the country, and there is pleasing prospect of a rise in the value of human life in the United States.



The forces calculated to bring about so desirable a result are, of course, chiefly moral. The streams of human sentiment which dashed so noisily for a while in the narrow channel of prohibition, and before had swept with such resistless force through the black cañon of abolition, have found wider channels and means of extensive irrigation in the broader fields of civic reform; and the signs of the times indicate that every owner will keep his own sidewalk clean in the next century. Wanting the energy of those social forces that make for righteousness, the law, of course, is powerless. With that dormant energy aroused, with public sentiment demanding civil order, legal functions will become stimulated and legal forces properly directed to accomplish this result. And the time is ripe for the patriotic lawyer to lend a hand in guiding the impulses and sentiments of the laity into channels that shall render them most efficient for law and order.

Obviously, his first duty, like that of the physician called to treat a patient, is diagnosis. It is mere empiricism to apply remedies without understanding the disease. It is social quackery to doctor symptoms. Such treatment may give temporary relief, but never will effect a cure. First, then, what ails the body politic? And next, what remedy can the law afford?

The homicidal symptoms under consideration, aggravated by local and temporary pathological conditions, are the plain outcome of a lawless and irreverent spirit pervading our heterogeneous population. A current contribution to the *North American Review*, by a writer of authority, attributes the great percentage of these crimes in the North to the immigrant population, and in the South to the negro. How much of these result from barbaric conditions and tendencies, and how much from scientific agnosticism, or base anarchism, is an interesting problem not pertinent to the present inquiry; but certain it is, that the criminal classes need either policemen or devil to restrain them, and the records of crime will show homicides to be fewest in those communities where the wholesome dread of both, acts conjointly in repressing violence.

The decay of popular faith is the sure precursor of crime, and irreverence and lawlessness are twin curses of American society to-day. With the former it is the special function of the church and kindred organizations to deal; and, since law can be no better than the public sentiment of a community, lawyers well may wish the success of all moral and religious influences in preserving popular faith and preventing moral decadence, in restoring

the reverent feeling of old and resisting the onslaught of vulgar skepticism upon all things sacred and holy. Assuming this cause of disease to be removed by the broad intelligence and earnest labors of the doctors of divinity and others having the cure of souls, what can lawyers do in the present epidemic of lawlessness? With reverence restored as a general and dominant sentiment, with a willingness and even desire upon the part of the body politic to use and apply the proper remedies to its present condition, what have the doctors of law to recommend?

The physician who finds a patient with hollow eyes and weak pulse, feeble voice and no appetite, with anon a chill and then a fever, the victim of "that tired feeling" so peculiarly American, knows only too well that from intemperance in drink or food, or work or play, from over-haste and hurry, or from over-work and worry, the nervous system has lost its tone, and its functions are now only half performed. Tonics are indicated; and he prescribes them, well knowing that until the tone of the nervous system is restored health and vigor will not return.

The American body politic is in atony. From intemperance, excitement and excess, from over-work and worry, from greed of gain and too eager pursuit of wealth, from over-use of stimulants to manufacture and trade, from devotion to obtaining patents and franchises, powers and monopolies, from selfish preference of individuals at the expense of society, from promoting personal rather than general welfare, from absorption of courts in the protection of vested rights of property to the neglect of life, liberty and the pursuit of happiness, there has resulted that loss of nervous tone in our body politic which tolerates the epidemic of homicide with indifference and lassitude. We are suffering from moral atrophy and commercial hypertrophy; and the utmost skill of lawyers and statesmen is needed to effect a cure; not that any new remedy need be prescribed, but that lawyers and judges shall have the intelligence to discern a sure remedy in an old prescription and the courage to insist that it be administered.

Enforce the law. This and none other is the tonic needed. This is the sure cure for the spirit of lawlessness abroad in the land. Simple it may be, but none the less effective for that. It is a perfect remedy for such conditions, a tried cure for such disease. In all ages and all countries it has been found effective; and no sufficient substitute has ever yet been discovered. Enforce it promptly, without sale, denial or delay. Let prosecution pursue the act, and punishment follow guilt adjudged. Let

the criminal feel that the penalty will surely follow crime. Naught else will restrain him who has not the fear of God before his eyes. Retributive justice is wholesome for society, and those who delight in crime deride our courts and laws. Blind and leaden-footed Justice they do not fear. Her they avoid and outrun; and so crime goes on; homicides increase and widows and orphans are multiplied throughout the land. Impotent courts invite Judge Lynch to take a hand; and one crime is piled upon another to satisfy the public demand for vengeance. And this passion of the body politic will have satisfaction, lawful if it may; but, if this is denied, then will it glut its maw with victims of its lawless violence.

Continuances of trial are too easily obtained in courts, groundless appeals double delay, and punishment is so long deferred oftentimes as to dull the edge of the sword of Justice. Time often heals the gaping wound, and society regards a punishment so long delayed with sympathy for the convict. The Governor intervenes, and mercy for the criminal inflicts cruelty upon society. Cruel and excessive punishments are not needed; nor, indeed, to be tolerated. But the public welfare, the repression of crime, and the prevention of homicide in our country inexorably demand that the punishment for murder committed and proven shall be speedy and certain. To so amend the criminal laws, and to so administer them that this result shall follow is the special function of the legal profession; and its performance will entitle lawyers to the gratitude of society.

In some States there may be no ground for complaint. In others existing laws may suffice, but the judiciary be remiss. In many, however, the merciful maxims of the days of the Stuarts, and a corresponding practice still prevail—maxims formulated by a judiciary resolved upon the protection of the people against royal persecution and tyranny at a time when there were more than a hundred capital offenses, and the accused was denied the privilege of counsel. All those cautions then given by merciful judges to juries, unenlightened by the discussion of counsel, are now used by artful attorneys for defense in winsome arguments, with what result is only too plain to be seen.

Continuances are sought and granted because of public excitement against the prisoner at the enormity of his own crime; and the public, fearing, oftentimes justly, that this is the first step toward the escape of notorious guilt, hasten with violence to prevent this consummation. To prevent all these evils, to defend society from such harms, there is no remedy but a return

to the wholesome *ante-bellum* days, when law was respected for its own sake, and enforced for the sake of society; when the courts of law were invoked as well for the prevention as the punishment of crime, and equity had not been suspected of being the guardian of the peace of society. The legal tonic for these times is to enforce the law.

*Henry H. Ingersoll.*

KNOXVILLE, December, 1897.

## THE RIGHT TO COMPETE FOR PUBLIC EMPLOYMENT.\*

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George William Curtis stated the purpose of civil service reformers, as early as 1869, in these words: "What we want is to intrench the principle and practice of Washington in the law." (II. Orations and Addresses, 9). The pioneer step to this end had been taken in Congress two years earlier, when Thomas J. Jenckes presented his report on the condition of the civil service, accompanied by a bill "to regulate the civil service of the United States and to promote its efficiency."

This early desire to embody the proposed reform in the law of the land found its first expression in the ninth section of the sundry appropriations bill of March 3, 1871. This measure authorizes the President "to prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge and ability for the branch of service into which he seeks to enter." It also authorized the President "to employ suitable persons to conduct said inquiries, to prescribe their duties, and to establish regulations for the conduct of persons who may receive appointments in the civil service."

This early recognition that the proposed reform must find expression in the law, shows how clearly its pioneers comprehended the nature of the mighty task to which they had set their hands. The story of what followed their first success in securing legal recognition of the reform—of the appointment by President Grant of an admirable commission headed by Mr. Curtis, of the active opposition by the spoilsmen, of the indifference of public sentiment, and finally in 1875 of the refusal of appropriations by Congress and consequent suspension of the rules—is too well known to require recounting here.

The early leaders of the reform movement, in seeking "to intrench the principle and practice of Washington in the law," made no mistake in the remedy for the monstrous evils of the spoils system. They failed for the moment sufficiently to real-

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\* Paper read before National Civil Service Reform League at Cincinnati, Ohio, December 17, 1897.

ize that law, to be effective under free institutions, must be the command of popular opinion. However, to them the failure of the Act of 1871 was only a repulse. They at once appealed from Congress to the people. By a few years of well-directed agitation they aroused and informed public opinion. The direct results were the national act of 1883, the New York act of the same year, the Massachusetts act of 1884, the New York constitutional provision of 1894, the Illinois act of 1895, and recent charter provisions of various cities. These achievements mark the progress of a rising and active popular sentiment in support of the merit system, which gives bright promise of its early extension to our entire civil service, national, state and municipal.

The legal situation is just now of peculiar interest. In Massachusetts, where the reform of course found a congenial atmosphere, it has been accepted as part and parcel of the orthodox faith. This happy result was not reached without some difficulty and even litigation. The appointing officers and the courts were for a time much perplexed by the veteran preference legislation; but a way has finally been found to recognize two privileged classes, women and veterans, under legislation the general purpose of which is to open public employment to the free competition of all. The Supreme Court in the case of *Brown v. Russell*, 166 Mass. 14, early in 1896, held the act of 1895, which required the appointment of any veteran to any position for which he and three citizens of his selection might certify him to be qualified, to be unconstitutional. Thereupon, by act of 1896, it was provided that veterans found to be qualified upon examination shall be preferred in appointment to all others, except women. The act also permits appointing officers to appoint or employ veterans without examination. This act the court by a majority of four to three has sustained, on the ground that the Legislature may have considered that veterans, otherwise qualified, are "likely to possess courage, constancy, habits of obedience and fidelity, which are valuable qualifications for any public office or employment; or that the recognition of the service of veterans in the way provided for by the statute would encourage that love of country and devotion to the welfare of the state which it concerns the commonwealth to foster." The minority of the court refuse to concede that the fact of being a veteran bears such relation to the duties of a present office or employment in the civil service that it can be made a decisive test in the selection of persons for employment, or that service in the army or navy in the late war is the only way to acquire

special fitness for public employment. They say: "The important matter is to get the best possible service, and the selections should be made with reference to the qualifications or fitness for the performance of the duties which are to be performed. And, since this is so, it is not within the constitutional power of the Legislature to fix as a decisive test anything which does not bear such a relation to the duties to be performed as to show special fitness for the performance of those duties." It is evident that the act thus sustained has at least gone to the extreme limit in securing a class preference by law.

The legal situation in New York shows that the fully-evolved spoilsman is not awed even in the presence of a constitutional provision. The constitution of 1894 requires that "appointments and promotions in the civil service of the State, and of all civil divisions thereof, \* \* \* shall be according to merit and fitness, to be ascertained, so far as practicable, by examination, which, so far as practicable, shall be competitive." The Court of Appeals, in the case of *People v. Roberts*, 148 N. Y. 148, broadly says, "The principle that all appointments in the civil service must be made according to merit and fitness, to be ascertained by competitive examinations, is expressed in such broad and imperative language that in some respects it must be regarded as beyond the control of the Legislature, and secure from any statutory changes. If the Legislature should repeal all the statutes and regulations on the subject of appointments in the civil service, the mandate of the constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal."

The same court, in the case of *Chittenden v. Wurster*, 152 N. Y. 345, 358, holds, that the question whether the examination of a candidate for a public position is practicable, is judicial and depends upon the nature and character of the duties of the position. This case presented the question whether a clerk to the committees of the Brooklyn board of aldermen, an assistant warrant clerk, a dockmaster, a chief clerk, a law clerk, a surveyor, a finance clerk, a license fee collector, a department secretary, a commissioner's clerk and a deputy license clerk, are within the constitutional provision, it appearing that they had been appointed without competitive examination. The plaintiffs produced a mass of evidence, including examination papers, reports and various civil service regulations, to show that competitive examinations for the appointments in question are prac-

ticable. The defendants produced no evidence to show that they are impracticable. The trial justice held "that it was and is practicable to ascertain the merit and fitness of a person to be appointed to each of said positions by competitive examination." The Appellate Division of the Supreme Court held that "none of these appointees fall within the debatable class, but were plainly susceptible of being filled by competitive examination." (14 App. Div. Reps. 497).

The Court of Appeals, by a majority of four to three, reversed the lower courts, holding generally, that where the duties of a position are not merely clerical, and are such as especially devolve upon the head of the office, which, by reason of his numerous duties, he is compelled to delegate to others, the performance of which require skill, judgment, trust and confidence, and involve the responsibility of the officer or the municipality which he represents, the position should be treated as confidential. (152 N. Y. 360).

The conclusion of the majority of the court was strongly contested in dissenting opinions by Judges Gray and O'Brien, in the first of which Chief Judge Andrews concurred. They pointed out that the six Justices below were unanimous in finding, upon uncontradicted evidence, that it was practicable to fill all the places in question by competitive examinations, and that "the obvious effect of the constitution was to remove the eleven places in question from the non-competitive schedule since it was practicable to fill them all by competitive examination." (152 N. Y. 386, 393). Judge O'Brien, in his very able dissenting opinion, correctly stated the situation in these words: "The future of the law which now rests upon the basis of the constitution is dependent upon the decision of this court. The decision in this case will either place the reform upon a reasonable and just basis, and command the approval of all good men, or it will be a step backward." (Id. p. 389). While the majority of the court frankly announce that, "should time and experience prove that we are in error \* \* \* we shall not hesitate to carry out the spirit and intent of the law." (Id. p. 360), it is to be remembered that the Court of Appeals must alone determine what the spirit and intent of the constitution require.

The prevailing opinion in the Chittenden-Wurster case must be regarded as a loose construction of the constitutional requirement that appointments and promotions shall be according to merit and fitness, to be ascertained by competitive examination, so far as practicable. It is "a step backward," by a great court



which had from the outset led in judicial support of the merit system. In the presence of a judgment so favorable to the spoilsmen, resting as it does upon the opinion of four of the Judges, against that of three others unanimously supported by the six Justices of the Supreme Court who passed upon the case below, the Court of Appeals can no longer truly say what it said in the Roberts case in speaking of the reform: "This court, upon more than one occasion, has, with entire unanimity, expressed its approval of the principle, and exercised all of its powers in every proper case in aid of all laws intended to carry out the idea." (148 N. Y. 364). If the majority opinion of the court is finally to prevail, the constitutional provision of New York, requiring competitive examinations so far as practicable, falls far short of the Illinois statute which provides that all applicants for positions in the classified service, from which but few places are excluded, "shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character."

The Legislature of New York, under an irresponsible dictatorship, has persistently neglected, since the adoption of the constitutional provision of 1894, to provide appropriate legislation to give it full and affirmative effect, as commanded by the constitution itself. This neglect was emphasized by the passage, at the last session, of a act providing for two examinations to ascertain the "merit and fitness" of candidates for appointment, one by the civil service commission to determine their relative "merit," and one by, or under the authority of, the appointing officer to satisfy him as to their "fitness." Each examination is to cover one-half of the rating of candidates. It is not in fact required that the so-called "examination" to ascertain "fitness" shall be competitive, or that it shall be public or made matter of record. It may be conducted by "some person or board designated by the person holding such power of appointment." In plain words, this so-called examination may be held at the party headquarters, on the street, or in the corner saloon, and may be conducted by a political committee, the party boss, or a convenient barkeeper. Mr. Schurz, in his powerful address of protest to the Governor, properly suggested that holding two examinations to ascertain "merit and fitness" is like requiring two examinations by physicians to find whether one is "hale and hearty," one as to whether he is "hale" and the other as to whether he is "hearty."

The act in question is the clumsy device of spoilsmen to nullify the constitution of the State. That a conspiracy so transparent and subversive of public order can succeed is of course impossible. There is nothing in the history of the courts of New York to give any promise of success to an unlawful purpose so obvious. In the prevailing opinion in the Chittenden-Wurster case, written after the passage of this measure, the Court of Appeals significantly said: "It is said that each officer having appointments to make could himself examine the applicants for position, and in that way determine who should be the appointee by a competitive examination. Undoubtedly, but it will readily be seen that this system would practically nullify the civil service law and bring it into disrepute." (152 N. Y. p. 356).

The submission of the "Black Bill" to the scrutiny of the courts, which is soon to be made, can have but one result. The certain defeat of this transparent attempt to nullify the constitution ought to prepare the way for the legislation which it commands.

The change of administration in Chicago last April has subjected the Illinois statute to a crucial test. Unfortunately, the act did not go into effect until the July following its adoption at the city election of 1895. That election resulted in a change from democratic to republican control. The new Mayor promptly turned out "the gang," as his followers not inappropriately called the democratic host, and installed "the boys," who were expected to control in his interest the republican machine, now euphoniously known as "the organization." This clean sweep and substitution even extended to some six hundred members of the police force. Having thus strikingly illustrated the need, and prepared the way, for reform, Mayor Swift appointed an excellent commission and thereafter cordially supported it. This seeming inconsistency on his part is perhaps traceable to a desire to mark the introduction of the merit system by a conversion as dramatic as that of St. Paul. Possibly he sought at the outset of his administration to put temptation behind him, or to create a sort of solitude in which the new commission might learn its duties and formulate the rules required by law. Whatever the truth, the Mayor thereafter sustained the commission while it worked out a thorough classification of the service, prepared adequate rules, held many examinations and certified a few eligibles for appointment. Under such conditions came the change from republican to democratic rule in the election of

Mayor Harrison last spring and a clean sweep of Mayor Swift's personal appointees.

The Illinois statute is based on the national, New York and Massachusetts acts. It differs from the earlier legislation in that it is more inclusive and stringent in its provisions. The excluded "head or heads of any department" of the New York act gives place to the "heads of any principal department" in the statute of Illinois. Unrestricted removals under all prior legislation give way in Illinois to removals only for cause, to be ascertained upon written charges after opportunity to the person charged to be heard. The Illinois act also provides that vacancies shall be filled by promotion where it is practicable; that promotions shall be "on the basis of merit and seniority of service and examination," and that "all examinations for promotion shall be competitive."

The commissions under the Illinois statute are continuous and independent bodies. Mayor Harrison, however, assumed the Chicago commissioners to be his subordinates, and that a majority of them should be in political and personal accord with himself. Upon the refusal of the majority of the old commission (the other member having been appointed Comptroller) to accept his construction of the words, "heads of any principal department," used in naming the excluded officials, to include some fifty heads of bureaus in the departments, inspectors and captains of police and various foremen and others, the Mayor removed the two remaining members on frivolous charges afterwards trumped up to comply with a provision of the statute requiring him to file his reasons for such removals. The new commission promptly published an opinion construing the words, "heads of any principal department," so as to exclude from the classified service most of the desirable positions claimed by the Mayor as spoils, thus giving him (to use their words) "the benefit of the doubt" as to the positions which "should be taken out of the classified service." The Mayor was thus enabled to fill the higher places in the service with avowed and active enemies of the merit system, an opportunity which he promptly improved. His appointees, with some honorable exceptions, in coöperation with the council, are doing what may be done to place the civil service law in a false light before the public, and—so far as practicable—to render it inoperative.

The statute excludes from the classified service "officers \* \* \* whose appointment is subject to confirmation by the city council." When the act was adopted but few officials, some

of them of minor importance, were subject to such confirmation. Upon the accession of Mayor Harrison it was feared by some of the best friends of the law that it is especially vulnerable at this point. Its enemies quickly sought to avail themselves of their apparent opportunity. The council promptly created a considerable number of new positions, making them all subject to confirmation by itself. The committee on civil service, on June 14, 1897, reported forms for four ordinances, recommending their passage. By these measures it was gravely proposed to designate as "heads of principal departments," as said term is used in section eleven" of the civil service act, numerous "public officials" and "all employes of the City of Chicago receiving three dollars or less per day, as compensation for work;" to make "the head of each and every department, bureau or division of work in the public service of Chicago," and certain experts, private secretaries, head assistants and others, subject to confirmation by the council; and to make all "transfers, appointments, discharges and promotions in the fire and police departments" subject to the order of the Mayor and approval of the council. These extraordinary proposals were opposed by the administration which was not prepared to attempt the complete nullification of the statute. Two weeks later the council passed, as an administration measure, an ordinance which provides that a considerable list of "officials" named "shall be designated as 'heads of principal departments,' as said term is used in section eleven" of the civil service act.

Some of the friends of the law, fearing these attacks were aimed at a vital point, deemed it wise to endeavor to save something by acquiescence. Others, and notably the Citizens' Association, held that the way to save the law was to defend it against all comers. The Citizens' Association retained special counsel and procured the Attorney-General to file petitions, on behalf of the people, in the Supreme Court for writs of *mandamus* to obtain an authoritative and final interpretation of the law, and of the power of the city council in respect to it. These cases were fully presented to the court in October last, and early decisions are expected. The new commission only contended for a liberal construction of the words, "heads of any principal department." The corporation counsel boldly attacked the constitutionality of the act, and defended the ordinance which seeks to make subordinate officials "heads of principal departments" merely by thus designating them. The writer's relation to these cases renders improper here any prophecy in regard to the

result. It must suffice here to say, that we hope for a judgment by the court strongly sustaining the act, with a finding that the ordinance is void as unreasonable and in conflict with the statute.\* The law is supported by public opinion. The penalties for its violation are severe. If fully sustained by the court, it will be at least reasonably enforced.

The President, by his executive order of July 27, 1897, directing that removals shall be made only for just cause, upon written charges and opportunity to be heard, has raised the question whether removals should be controlled by law. Civil service reformers have hesitated to place any legal restraint upon the power of removal by the appointing officer for any cause satisfactory to him. They have assumed that such officers will not be apt to remove efficient subordinates to make way for unknown successors to be taken from the eligible list. As early as 1881, in his address before The American Science Association, Mr. Curtis said:

"Removal for cause alone means, of course, removal for legitimate cause, such as dishonesty, negligence or incapacity. But who shall decide that such cause exists? This must be determined either by the responsible superior officer or by some other authority. But if left to some other authority the right of counsel and the forms of a court would be invoked; the whole legal machinery of mandamuses, injunctions, certioraris, and the rules of evidence, would be put in play to keep an incompetent clerk at his desk or a sleepy watchman on his beat. Cause for the removal of a letter-carrier in the post-office or of an accountant in the custom house would be presented with all the pomp of impeachment and established like a high crime and misdemeanor." (II. Orations and Addresses, p. 190).

Mr. Curtis, in his second annual address as President of the League in 1883, also said: "We do not plead for fixed permanence in public place, nor assert a vested right in public employment. Due subordination and discipline are essential to all effective organized service, and therefore, dismissal for proper cause should be prompt and sure. To this end the power of removal should be left as free as possible, provided that motives for its illegitimate exercise are destroyed. Such a provision

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\*The Supreme Court of Illinois on December 22, 1897, handed down a strong opinion in these cases holding the statute to be constitutional and the ordinance in question void for unreasonableness. The court, in effect, holds that the council has no power to add to the list of exclusions from the act. This decision places the Illinois act on a firm basis.

secures both proper discipline and a just tenure." (Id. p. 248). Again, in his sixth annual address, he said: "The power of removal no less than that of appointment is a public trust, and it cannot be rightly used arbitrarily or for any other cause than the public interest. Such cause should be publicly assigned and recorded, that the people may clearly understand the reason of the change in the service." (Id. p. 340).

These passages indicate what has been the generally accepted view of reformers. Aside from the prohibition of removals for political reasons, there was no attempt until recently to limit the power of removal by appointing officers. The framers of the Illinois act took the first step in advance by providing that "no officer or employe in the classified service \* \* \* shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard." From this provision laborers and "persons having the custody of public money, for the safe keeping of which another has given bond" are excepted. "Such charges shall be investigated by or before said civil service commission, or \* \* \* some officer or board appointed by said commission to conduct such investigation. The finding and decision of such commission, or investigating officer or board when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such." (Act 1895, Sec. 12).

These provisions, it will be observed, make no attempt to define what causes shall be sufficient to justify removals. It is not believed that the act confers upon those in the classified service any vested right to continue in public employment, or to call upon the courts to determine whether any alleged cause of removal, except it be political, is sufficient to justify it. The intention is to protect the classified service from arbitrary and unjust removals by appointing officers, and to prevent removals for other than causes that will bear public record, after opportunity to make defense. Under this act the commission is made publicly responsible for every removal from the classified service.

The question involved in the recent decisions of United States courts, whether the President's order in respect to removals has the force of law, is less important than the question whether it ought to have such force. The answer to the first depends upon the extent of executive power under the civil service act to make rules that shall have the force of law. The answer to the other must be sought in the further inquiry,

whether public employment can be the subject of vested right,—whether office is a place of public service, or a castle to be privately held and enjoyed.

The merit system of appointment recognizes and protects the right of all to compete for public employment, the right of freedom of contract with the largest employer of skilled and unskilled labor. The Massachusetts act provides for the punishment of officials and others who shall "defeat, deceive or obstruct any person in respect of his or her *right of examination*," (Sec. 18). The constitution of New York requires all appointments to be made upon "examination which, so far as practicable, shall be *competitive*." The Illinois act provides that "all applicants for offices or places in said classified service \* \* \* shall be subjected to examination, which shall be public, *competitive and free to all citizens of the United States*, with specified limitations as to residence, age, health, habits and moral character." (Sec. 6).

The Supreme Court of Massachusetts, in the case of *Commonwealth v. Perry*, 155 Mass. 117, said: "There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. \* \* \* The declaration of rights in the constitution of Massachusetts enumerates among the natural, inalienable rights of men the right 'of acquiring, possessing and protecting property.' \* \* \* The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law."

The Supreme Court of Illinois in the case of *Braceville Coal Co. v. People*, 147 Ill. 66, 70, said:

"The fundamental principle upon which liberty is based, in free and enlightened government, is equality under the law of the land. It has accordingly been everywhere held, that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation and calling as he may choose, subject only to the restraints necessary to secure the common welfare."

The same court, in the great case of *Ritchie v. People*, 155 Ill. 98, 104, also said: "The privilege of contracting is both a liberty and property right. \* \* \* The right to use, buy and sell property and contract in respect thereto is protected by the constitution. Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as

has any other property owner. \* \* \* The right to labor or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty."

Thus it follows that the right of freedom of contract with the largest employer of labor, is a property right which is protected by the fundamental law (see also, Stimson's "Handbook to the Labor Law of U. S.," pp. 10, etc.); that all citizens, having the proper requirements of age, health and character, have a property right to compete for public as well as private employment. It is the great purpose of the merit system of appointment to give force and effect to this fundamental right of free men.

We are now ready for the inquiry, whether the right to compete for public employment extends, on behalf of the successful competitors, beyond the threshold of such employment, there to become a vested property right in the office itself. Unless offices exist to be held, the answer must be in the negative. A fundamental principle of civil service reform is that public office is a public trust. It is an opportunity to render a public service, and whatever of personal honor and profit attach to it is but incidental. The public has a right to the most efficient and devoted service, and to this end to continue competent and faithful officials in its employment. Thus the public need, not personal interest, becomes and is the basis and measure of a just tenure. Only in this view can "the public service be, indeed, the public service" (Gladstone)—the property of the nation, not an asset of a party boss or machine.

We may, therefore, conclude that the right to compete for public employment is a property right of all; that this right is part and parcel of the fundamental right of freedom of contract; that a right of such importance ought to be given full force and effect by positive law. We have seen that this is the purpose of all civil service legislation. It also follows that public office is not properly a subject of vested right; that official position is an opportunity for public service, not a private property interest; and that its control is an executive, not a judicial, function. If these conclusions are sound, it remains for the executive to prevent removals except for just cause. It does not follow that the President's order is less wise because it is not properly enforceable by the courts. It will be to the lasting honor of the present administration if it shall firmly establish a rule of executive action to prevent removals without just cause.



The evolution of modern democracy is from the simple and primitive groups of kinsmen, known to us as village communities. The crude democracy of these isolated communities gave way to the despotic feudal monarchy which welded them into the great nation having a definite territory, uniform laws and comparative freedom from local disorder. Then came the long struggle for a democracy which should combine the great advantages of a wide national authority with as much as practicable of the local self-government and personal freedom of the village community. This struggle is marked by a long succession of popular victories over despotic privilege. The spoils system in our day is a mercenary survival of feudal privilege. Its destruction will remove another barrier from between the people and their government. The merit system, in its purpose "to intrench the principle and practice of Washington in the law," seeks to recover a fundamental right of free men. To such a purpose, complete success is sure. It may be here and there delayed, but it will come.

*Edwin Burrill Smith.*

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BILLS OF LADING GIVEN FOR GOODS NOT IN  
FACT SHIPPED.

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MUNSON PRIZE THESIS.

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## OUTLINE.

- I. Definition of a bill of lading as herein treated.
- II. The legal character and uses of bills of lading.
- III. The effect of a *false* bill of lading upon the rights and liabilities of those who may deal with it.
  - First. As between the original parties.
  - Second. As between a *bona fide* holder for value and either of the original parties.
  - Third. As between a *bona fide* holder for value and the carrier whose agent signed the bill of lading.
    - (1) The English cases holding carrier *not liable*.
    - (2) The cases in United States adopting the English rule.
    - (3) The cases holding the carrier *liable*.
- IV. The point on which the conflict arises.
- V. Some additional arguments for applying the doctrine of estoppel and holding the carrier liable.

## I.

A bill of lading is at once a receipt and a contract. As a receipt it states that certain goods *have been* received for shipment. As a contract it contains an agreement for the transportation and delivery of these goods. It is with the bill of lading as a receipt that we shall deal in this paper.

Although a bill of lading is a receipt and is, in this respect, governed very largely by the rules of law applicable to receipts in general, yet it is far more important than the ordinary receipt, and deserves a brief preliminary consideration as to its true legal character. In the first place it is the symbol of the

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NOTE.—States that hold carriers liable: New York, Connecticut, Kansas, Nebraska, Pennsylvania, Illinois, and Alabama. States that hold them not liable: Louisiana, Massachusetts, Ohio, Missouri, Maryland, Indiana, and Minnesota.

property described in it. The law-merchant regards it as a muniment of title, carrying the property with it, and as a negotiable instrument in itself. But the common law does not go quite so far. However, at common law it is the representative of the property to such an extent that a transfer of it transfers the property. In *Evans v. Marlett*<sup>1</sup> Chief Justice Holt said, "The consignee of a bill of lading has such a property that he may assign it over." Lord Mansfield, who is called "the founder of the commercial law of England," said,<sup>2</sup> "Since the case in *Lord Raymond* it has always been held that the delivery of a bill of lading transferred the property at law." The case of *Lickbarrow v. Mason*,<sup>3</sup> decided in 1787, is the leading case on this question. In it T. & Son had shipped goods to F. and had sent him an indorsed bill of lading. F. transferred this bill of lading to Lickbarrow, who made advances on it. Before F. had either received or paid for the goods he became insolvent. T. & Son, on learning this, attempted to exercise the right of stoppage *in transitu*. They sent a bill of lading which they had retained, to Mason, who, by the use of it, secured the goods and sold them for T. & Son. Lickbarrow sued Mason for conversion. Judge Ashurst, in deciding the case, approved the doctrine as stated by Chief Justice Holt and Lord Mansfield, and held that according to the law and "the universal understanding of mankind," a transfer of the bill of lading transferred the property. This being true, Lickbarrow had secured title to the goods through the bill of lading indorsed by the shipper, and hence he was allowed to recover.

But the doctrine of *Lickbarrow v. Mason* goes farther than simply declaring that "as between the vendor and third persons the delivery of a bill of lading is a delivery of the goods themselves." It holds that a bill of lading is, to a considerable extent, a negotiable instrument. Judge Ashurst said, "The assignee of a bill of lading trusts the indorsement; the instrument is in its nature transferable; in this respect therefore, it is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only; but he has made it an indorsable instrument. So it is like a bill of exchange; in which case as between the drawer and the payee the consideration may be gone into, yet it *cannot* between the drawer

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<sup>1</sup> *Lord Raymond* 271.

<sup>2</sup> *Wright v. Campbell*, 1 Fowl. Ex. 388.

<sup>3</sup> 2 Term Rep. 63.

and an indorsee; and the reason is because it would enable either of the original parties to assist in a fraud. The rule is founded *purely on principles of law*, and not on the custom of merchants. \* \* \* This is also the case with respect to bills of lading." This extreme view has not been upheld by the later decisions. Lord Ellenborough said,<sup>4</sup> "A bill of lading indeed shall pass the property by a *bona fide* indorsement and delivery, where it is intended so to operate in the same manner as a direct delivery of the goods themselves would do, if so intended, *but it cannot operate further.*" Lord Campbell said,<sup>5</sup> "A bill of lading is not, like a bill of exchange or a promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee for a valuable consideration without regard to the title of the parties who make the transfer. \* \* \* If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods." From these and many other cases<sup>6</sup> it is evident that the common law does not regard a bill of lading as *strictly* and *technically* negotiable, like a bill of exchange, but it does give to the bill of lading a *quasi* negotiable character. An assignment of a bill of lading transfers rights *in rem*, rights to the specific goods, and these rights are to a certain extent wider than those possessed by the assignor. An indorser of a bill of lading does not become liable for the fulfilment of the contract part of it.<sup>7</sup> An assignment of a bill of exchange, on the contrary, merely confers upon the assignee rights *in personam*. A bill of lading, transferred without the authority, consent, or knowledge of the owner, gives no title—not even to a *bona fide* holder for value.<sup>8</sup> But it has been held that where a bill of lading was secured by fraud and transferred to an innocent purchaser it gave a good title.<sup>9</sup> Hence, it possesses many of the characteristics of a bill of exchange. By statute in England<sup>10</sup> bills of lading have been made negotiable by indorsement. Under this statute the consignee or indorsee to whom the property has passed by indorsement has all the rights and is subject to all the liabilities created by the instrument just as if

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<sup>4</sup> *Newson v. Thornton*, 6 East. 17.

<sup>5</sup> *Gurney v. Behrend*, 3 El. and B. 622.

<sup>6</sup> 42 Conn. 579; 9 Fed. Rep. 133; 15 Wend. 474; 44 Md. 11.

<sup>7</sup> *Maybee v. Tregent*, 47 Mich. 595.

<sup>8</sup> 101 U. S. 557, and 34 Ind. 1.

<sup>9</sup> 24 N. Y. 638.

<sup>10</sup> 18 and 19 Vict. c. iii. s. 1.

it had been made to him at first.<sup>11</sup> Several of the United States have passed similar statutes. Missouri and Pennsylvania made bills of lading negotiable in the same manner as bills of exchange and promissory notes, but the supreme court<sup>12</sup> held that these statutes referred only to the manner of transfer and not to the consequences of such transfer. Maryland has a statute which makes them negotiable in the same manner and to the same extent as bills of exchange. In *Tiedeman v. Knox*<sup>13</sup> it was held that this statute gave to one who took a bill of lading from the consignee and applied it to payment of an antecedent debt, all the rights of a *bona fide* holder for value and hence the right to the property described in the bill, although the consignee had not paid for the goods. The statutes of Mississippi, Minnesota, Louisiana, New York, California and Wisconsin, are somewhat to the same effect. But independent of statute many of the courts of this country hold that, to a very great extent, bills of lading are negotiable. In actual business they are given a negotiable character. They pass from hand to hand and are in constant use as collateral security. Next to commercial paper they are the most important instruments known to the business world. While this *quasi* negotiable character may be destroyed by a contract expressed upon the face of the instrument, it is well understood that unless so expressed the carrier is bound to recognize the validity of transfers and is liable to the holder of a *valid* bill for the goods therein described. The fact that every one who deals with bills of lading is presumed to know their uses and legal character is an important element in determining the effects of bills issued for goods not in fact shipped. This is the justification for considering their legal character as we have in this connection.

It often happens either by the mistake, the negligence, or the fraud of some one concerned, that bills of lading are given for goods not actually received by the carrier, or for more goods than in fact come into the carrier's possession. It is our purpose to consider the effect of these false receipts upon the rights and liabilities of the various parties who may deal with them.

The general rule of law is that *receipts* are only *prima facie* evidence of the truth of the statements they contain, and hence, that extrinsic evidence may be introduced to explain or contradict them. Bearing in mind the legal character and the

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<sup>11</sup> 3 L. R. C. P. 594.

<sup>12</sup> 101 U. S. 557.

<sup>13</sup> 53 Md. 612 (1880).

ordinary uses of bills of lading, let us investigate the question, To what extent does this general rule apply to them as receipts? This question may arise, first, between the original parties (*i. e.*, the one signing the bill and the shipper, or those who take with notice, or without value); second, between a *bona fide* holder for value and either of the original parties; third, between a *bona fide* holder for value and the carrier by whose agent the bill of lading was issued.

First. As between the original and immediate parties to a bill of lading the general rule applies with full force. The bill is strong evidence that the goods mentioned therein were delivered to the one signing the bill, but it is only evidence and is open to explanation or contradiction.<sup>14</sup> This rule not only allows the *master* or *agent* who signed the bill to show that the statements contained in the receipt part of it are false, but it also allows the ship-owners and carriers the same privilege. This evidence to explain or contradict is admissible not only against the shipper but also against any holder who is not a *bona fide* holder for value. Mr. Abbott<sup>15</sup> says, "Except as against a *bona fide* transferee of the bill of lading for value, the carrier may contradict it as to the delivery to him of the goods, or as to their description, quality, or condition." Judge Edmonds<sup>16</sup> has said: "As between the shipper of the goods and the owner of the vessel, a bill of lading may be explained so far as it is a receipt." Sutton *v.* Kittell<sup>17</sup> holds that a bill of lading is open to explanation against a consignee unless he has made advances upon it. In Sears *v.* Wingate<sup>18</sup> it is said, "The receipt of a bill of lading is open to explanation between the master and the shipper." Judge Shipman in Relyea *v.* New Haven R. M. Co.,<sup>19</sup> held that as between the ship-owners and the shipper the bill of lading was open to explanation. It has also been held<sup>20</sup> that where a carrier has issued a bill of lading for more goods than it received from the consignor and has paid the consignee the deficiency, it could recover the amount paid from the consignor. In a recent case<sup>21</sup> Mr. Justice White held that a railroad company was not liable to the shipper on a bill of lading given before the goods

<sup>14</sup> Redfield on Car. and Bail. p. 218.

<sup>15</sup> Trial Evidence, p. 537, § 45.

<sup>16</sup> Dickerson *v.* Seelye, 12 Barb. 102.

<sup>17</sup> Sprague's Decisions, 309.

<sup>18</sup> 3 Allen 103.

<sup>19</sup> 42 Conn. 579.

<sup>20</sup> Graves *v.* Harwood, 9 Barb. 477.

<sup>21</sup> Mo. Pac. R. R. *v.* McFadden, 154 U. S. 161.

were received, although the goods were destroyed by fire at the place where the carrier was to take possession of them. "The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry." This rule is not changed by the issuance of a bill of lading, so far as the shipper's rights are concerned.

Second. As between a *bona fide* holder for value and either of the original parties, the general rule of law is superseded by the equitable doctrine of estoppel. When the master of a vessel or the agent of any common carrier signs a bill of lading for goods not actually received, or for more than are received, such master or agent is estopped from denying the truth of the statements made in the bill, as against one who, in good faith, has relied on those statements and has parted with value.<sup>22</sup> The shipper who has transferred a bill of lading is also estopped to deny that he delivered the goods to the carrier as against a *bona fide* transferee for a valuable consideration. *Byrne v. Weeks*<sup>23</sup> held that the master was concluded by statements in his bill of lading as to the quantity of goods received as against a *bona fide* assignee or transferee, and the master was compelled to make good all loss caused by his misstatements. But if his misstatements are caused by misrepresentations of the shipper, the master may recover from the shipper all he is compelled to pay to the assignee.<sup>24</sup> This principle does not apply to one who buys the goods before shipment or who does not rely on the bill of lading.<sup>25</sup> Nor is the master concluded by statements of quantity followed by the qualification "more or less," unless the deficiency is great.<sup>26</sup> In *Tindall v. Taylor*<sup>27</sup> the consignor after having sent the bill of lading to the consignee, took the goods from the master of the vessel. Lord Campbell said, "An action of contract on the bill of lading could not have been maintained by the indorsee of the bill of lading; but in respect to his property in the goods he might have maintained an action against the master for detaining or converting them, and the master, after the declaration in the bill of lading on faith of which the indorsee had bought and paid for them, would be

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<sup>22</sup> *Berkley v. Watling* (1837), 7 Ad. and El. 29.

<sup>23</sup> 7 Bos. 372.

<sup>24</sup> *Saten v. Standard Oil Co.*, 17 Hun. 140.

<sup>25</sup> *Meyer v. Peck*, 28 N. Y. 590.

<sup>26</sup> *Kelley v. Bowker*, 11 Gray 428, and *Blanchet v. Powell, etc., Co.*, L. R. 9 Ex. 74.

<sup>27</sup> 4 El. and Bl. 219.

estopped from denying that he had received them." Judge Hoar has said,<sup>28</sup> "The master is estopped, as against a consignee who is not a party to the contract and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as these statements relate to matters which are or ought to be within his knowledge." Other cases<sup>29</sup> give the consignee a right of action against the master and estop the master from denying the statements made in his bills of lading. The same rule is applied to a warehouseman who has given a false receipt.<sup>30</sup> *Hunt v. Miss. Cent. R. R.*,<sup>31</sup> holds that an agent of a common carrier would be liable on a false bill of lading signed by him, as against a *bona fide* holder for value. In England this rule was embodied in the Bill of Lading Act,<sup>32</sup> in which it is said, "Every bill of lading in the hands of a consignee or endorsee for a valuable consideration, representing goods to have been shipped on board of a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same." This section of that act was interpreted in *Meyer v. Dresser*<sup>33</sup> and *Jessel v. Bath*.<sup>34</sup> In those cases it was held to apply only to the one signing the bill. It is a well-known application of the doctrine of estoppel that prevents the consignor who has secured and transferred a false bill of lading, from denying the truth of its statements. This is taken as a settled doctrine in *Schooner Freeman v. Buckingham*,<sup>35</sup> and numerous other cases. So we may conclude that it is a well-established rule, both in this country and in England that the immediate parties to a bill of lading (*i. e.*, the consignor and the one who signs it) are estopped to deny the truth of its statements as against a *bona fide* holder for value.

Third. As to the application of the general rule to cases which arise between a *bona fide* holder for value and the carrier whose agent has issued a false bill of lading, there is an interesting conflict of opinion. The courts of England, the Federal

<sup>28</sup> *Sears v. Wingate*, 3 Allen 103.

<sup>29</sup> *Relyea v. New Haven R. M. Co.*, 42 Conn. 579, and *Bradstreet v. Heran*, 2 Blatchf. 116.

<sup>30</sup> *McNeil v. Hill*, *Woolworth's R.* 96.

<sup>31</sup> 29 La. Ann. 446.

<sup>32</sup> 18 and 19 Vict. c. iii. s. 3.

<sup>33</sup> 16 Com. Bench (N. S.) 644.

<sup>34</sup> L. R. 2 Ex. Cases 267.

<sup>35</sup> 18 How. 182.



courts of this country, and several of our State courts hold that the general rule applies and that the carrier is not estopped by the act of its agent, to deny the truth of the bill so far as it is a receipt. Several other State courts, however, with a considerable show of reason, hold that the carrier is estopped to deny the statements made by its agent, when the bill comes into the hands of a *bona fide* holder for value. Let us consider in chronological order as nearly as may be convenient: (1) The English cases; (2) The cases in the United States which adopt the English doctrine; and (3) The cases which hold the doctrine of estoppel.

(1) The great case of *Lickbarrow v. Mason* (1787) did much to settle the legal character of a bill of lading in England. From that time until 1851 the conclusiveness of a bill of lading in the hands of a *bona fide* holder for value as against the carrier whose agent signed it, does not seem to have been passed upon directly. However, in 1851, *Grant v. Norway*<sup>36</sup> decided this question and established the rule which has been followed by subsequent decisions. This was an action by the indorsee against the owner of a vessel to recover the amount advanced on faith of a bill of lading signed in due form by the master of the vessel. It was shown to be a custom among merchants to make advances in that way, but Chief Justice Jervis held that, although the authority of the master was extensive, yet it had well-known limitations. He is a general agent to give bills of lading for goods received. No one could assume that the master had authority to sign a bill of lading before the goods were put on board. Hence, in this case he had acted clearly outside his authority and the owner could not be held liable. *Hubbesty v. Ward*<sup>37</sup> (1853) followed the doctrine of *Grant v. Norway*. Chief Baron Pollock said, "We think that when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted; he has no right or power, by signing other bills of lading for goods that are not on board, to charge his owner." The case of *Coleman v. Riches*<sup>38</sup> (1855) is in the same line. R. was a wharfinger and carrier. His agent issued a false receipt for corn on which C., as was his custom, made advances. The court held that the agent was not acting within the scope of his authority and did not bind his principal. In

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<sup>36</sup> 10 Com. Bench 665.

<sup>37</sup> 8 Exch. 330.

<sup>38</sup> 16 Com. Bench 103.

*Meyer v. Dresser*<sup>39</sup> (1864) the master of a vessel sued the indorsee of a bill of lading for freight. The indorsee invoked the statute<sup>40</sup> already referred to and claimed the right to set off for goods named in the bill of lading but not shipped. It was held that a cross-action might lie against the *master*, but that a deduction could not be allowed from the amount of *freight due on other goods*. In *Jessel v. Bath*<sup>41</sup> (1867) B.'s agent gave a bill of lading for a certain number of pounds of manganese, when a much smaller number had been shipped. J., who had paid for the full amount, relying on the bill of lading, was not allowed to recover, on the ground that the agent exceeded his authority. *McLean v. Fleming*<sup>42</sup> (1871) was a case against the owner of a vessel for failing to deliver all the goods called for in the bill of lading. Held, that the bill of lading was *prima facie* evidence of the amount of goods shipped, but that the owners might show that their agent had given it for more goods than were received. In *Brown v. Powell Coal Co.*<sup>43</sup> (1875) the owners of a vessel, who had voluntarily paid a consignee the difference between the value of the goods delivered and those called for in the bill of lading, sued the charterer of the vessel to recover this amount. It was held on the authority of *McLean v. Fleming* that the owners were not legally liable to the consignee on the false bill of lading and hence that they could not recover from the charterer. In the case of *Car v. R. R.*<sup>44</sup> (1875), Car had bought goods to be shipped by the railroad and had received from the railroad advice-notes stating that *three* parcels had been received when only *two* had been in fact received. The servants of the railroad knew that only two had been received but failed to give Car notice. Car paid for three and after finding only *two*, sued the railroad. Judge Brett, in deciding the case, said that the suit could not be maintained except on the doctrine of estoppel *in pais*. He discussed the elements of estoppel and showed that it could not be applied to the railroad because the railroad did not know the statements were false and was not negligent. Lord Esher in *Cox v. Bruce*<sup>45</sup> (1886), held that it was beyond the agent's authority to bind the owners of a vessel by false

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<sup>39</sup> 16 Com. Bench (N. S.) 646.

<sup>40</sup> 18 and 19 Vict. c. iii. s. 3.

<sup>41</sup> L. R. 2 Ex. cases 267.

<sup>42</sup> L. R. 2 Scotch Appeals 128.

<sup>43</sup> L. R. 10 C. P. 562.

<sup>44</sup> L. R. 10 Com. Pleas. 307.

<sup>45</sup> L. R. 18 Q. B. D. 147.

statements in regard to the quality or condition of the goods shipped. The owners were not estopped from proving that the bill of lading was false in that regard.

These cases show that in England the rule is well established that a carrier may explain or contradict any bill of lading signed by its agent without express authority, so far as it is a receipt, even against a *bona fide* holder for value.

(2) The Federal courts of this country have adopted the same rule as that established in England. The first great case was *Schooner Freeman v. Buckingham*<sup>46</sup> (1855). In this case the general owner of a vessel had made a conditional sale of it and the special owner by fraud had induced the master to sign a false bill of lading on which B. had made advances. The court in deciding that this did not create a lien on the vessel in favor of B. held that while the vessel was bound to the freight and the freight to the vessel for the performance of the contract, yet no lien could arise until a *valid contract* was made and the cargo actually shipped. In discussing the doctrine of estoppel in connection with this case Mr. Justice Curtis said, "If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is because the bill is signed by one not *in privity* with the owner. But the same reason applies to a signature of a master made out of the course of his employment. The taker assumes the risk not only of the genuineness of the signatures and of the fact that the signer was master of the vessel, but also of the *apparent authority* of the master to issue the bill of lading. \* \* \* But the master of a vessel has no more apparent unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority if the ship be a general one to sign bills of lading for *cargo actually shipped* and he has also authority to sign a bill of sale of the ship, when in case of disaster his power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, even in favor of an *innocent purchaser*, if the facts upon which his power depends did not exist; and it is incumbent on those who are about to change their condition, upon faith of his authority, to ascertain the existence of all the facts upon which his authority depends." The case of *Montell v. Schooner Rutan*<sup>47</sup> (1865) was a libel against the vessel and her

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<sup>46</sup> 18 How. 182.

<sup>47</sup> 17 Fed. Cases 615.

master, who was a part owner, by the assignee of a fraudulent bill of lading issued by the master. Judge Betts said, "A cardinal restriction which applies to this case is, that a master cannot subject a ship *in rem*, much less his co-owners, to a responsibility for a safe carriage and delivery of a cargo *not actually laden on board* of it for transportation in the lawful employment of the vessel. This principle is too firmly rooted in the doctrines of commercial jurisprudence to be subjected to question in this country or in England. That, as the libellants prove by the master himself that he executed the bill of lading with knowledge that the wheat was not on board at the time, the bill of lading was *nugatory and fraudulent as to the vessel and all her co-owners, except the master himself.*" The case of *The Lady Franklin*<sup>48</sup> (1868), was a libel against the vessel on a bill of lading issued by mistake for goods which had been shipped by another vessel and lost. Mr. Justice Davis in deciding that the owners of the vessel were not estopped to contradict the bill of lading, said, "There was no cargo to which the ship could be bound and there was no contract for the performance of which the ship stood as security." *The Loon*<sup>49</sup> (1870) was a case almost exactly like the *Schooner Freeman v. Buckingham*, and Judge Woodruff arrived at the same decision. He held that, although bills of lading ever since the case of *Lickbarrow v. Mason* had been considered negotiable for some purposes, yet they do not import *absolute verity* and are not conclusive on the owners of a vessel even in the hands of an innocent purchaser. *Pollard v. Vinton*<sup>50</sup> (1881) is a great case and passes on the main question directly. P. accepted and paid a draft relying on the bill of lading which the agent of V.'s boat had issued for goods not in fact shipped. Mr. Justice Miller held that the act of the agent was beyond his authority and not binding on the owner. In answer to the argument that the bill of lading was negotiable, he said, "A bill of lading is an instrument well known in commercial transactions and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instru-

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<sup>48</sup> 8 Wall. 325.

<sup>49</sup> 7 Blatchf. 244.

<sup>50</sup> 105 U. S. 7.

ment or obligation in the sense that a bill of exchange or promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of a person who has innocently paid value for it. The doctrine of *bona fide* purchasers only applies in a limited sense." *Robinson v. M. & C. R. R. Co.*<sup>51</sup> (1881) was decided in the same year and on almost the same facts as *Pollard v. Vinton*. A *bona fide* purchaser sued the railroad on a bill of lading issued by its agent when no goods were shipped. In a very learned and exhaustive opinion Judge Hammond attempts to answer all the arguments in favor of the railroad's liability. He shows that the bills of lading have been developed exclusively for the advantage of the trader and not of the railroad. They are not negotiable securities which the railroad is bound to protect. Carriers should not be made insurers or guarantors on an instrument in which they have no interest. It is a liability *dehors* the contract, and the amount of freight paid does not cover the risk. It would compel the carriers to employ and pay agents whose qualifications are the same as those of banks and trust companies. The supposed convenience to commerce is not sufficient to overcome these considerations. Besides it would not be difficult for those who deal with bills of lading to find out concerning their genuineness. Banks and factors must attend to the honesty of their customers and they should know that it is the carriers' business to carry and deliver goods and that its liability does not begin until the goods are actually received. Carriers were not created for the purpose of issuing commercial paper. Bills of lading are only *quasi* negotiable and those who deal with them must ascertain their genuineness. No special or general custom can make them negotiable like bills and notes.<sup>52</sup> The doctrine of estoppel is the strongest argument in favor of the carrier's liability. The principal is estopped by the representations of his agent so long as that agent is acting *within the apparent scope of his authority*. But carriers do not hold out their agents as having authority to issue *false* bills of lading. Such an act is clearly beyond *even the apparent scope* of a freight agent's authority. It is doubtful if the directors themselves could estop the company. The charter gives no power to issue *false* bills of lading. The master of a vessel cannot bind the owners by issuing false bills and he is a general agent with extensive powers. A freight agent is a spe-

<sup>51</sup> 9 Fed. R. 129.

<sup>52</sup> Whart. Agency, §§ 134, 675, 676.

cial agent and every one is presumed to know the limitations of his authority. The whole question rests on the doctrine of agency and since the agent has acted outside of the scope of his authority he has failed to bind the carrier. The case of *St. Louis, etc., R. R. v. Knight*<sup>53</sup> (1887) was one in which the consignee attempted to hold the railroad liable on a bill of lading because the goods delivered were not of the *quality* described. Mr. Justice Matthews held that the agent had no authority to misdescribe the goods and hence that the railroad was not estopped to show that the goods delivered to the consignee were the very goods received for transportation. In *Friedlander v. Texas, etc., R. R.*<sup>54</sup> (1889) an assignee for value of a false bill of lading sued the railroad. Chief Justice Fuller, in giving the decision, pointed out the legal character of the instrument and discussed the doctrine of estoppel as applied to it. He agreed with the opinion of Mr. Justice Story,<sup>55</sup> that a transfer of a stolen bill of lading would not transfer the title to the goods, but that if the owner or carrier is negligent, or holds out the agent as having the necessary authority to issue or transfer the bill of lading, the doctrine of estoppel would apply. He found that the railroad had not been negligent and that the agent had departed from his authority and become *particeps criminis* for the purpose of committing a fraud. He therefore held that the action could not be maintained against the railroad either *on contract* or *for tort*. Judge Townsend, in *Dun v. City Nat. Bk.*<sup>56</sup> (1893), gives a very learned opinion on this question of agency. It is a case in which one of Dun's sub-agents had given false information to the bank concerning the financial standing of an acceptor of a draft which the bank was about to purchase and which it did purchase on the faith of this information. The question raised was, "To what extent is an innocent principal liable for damages caused by the frauds and deceits of his agent?" The Judge said the cases on this question were not harmonious but that the difference was not one of principle but one of application. Was the agent acting within the scope of his authority? If so the principal is liable. If not, the principal is not liable. He found that Dun's agent was not acting within the scope of his authority when he purposely gave the false information and hence that Dun was not liable. The case of

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<sup>53</sup> 122 U. S. 79.

<sup>54</sup> 130 U. S. 416.

<sup>55</sup> 101 U. S. 557.

<sup>56</sup> 58 Fed. R. 174.

*Walters v. W. and A. R. R.*<sup>57</sup> (1893) seems at first view to be out of line with the other United States court decisions. A firm was doing business at A and at M. The railroad officials appointed one of this firm as agent at M. This agent delivered goods to the firm without cancelling the bills of lading. Afterwards the firm sold these bills of lading and the railroad was estopped to deny their validity. But this case is distinguished from the others in that the bills were valid when issued and in that the railroad officials had negligently acquiesced in such irregular dealings with the firm. So we may say that the decisions in the Federal courts present a strong and unbroken line to the effect that the carrier is not estopped to deny the receipt part of a bill of lading issued by its agent, even as against a *bona fide* holder for value.

T. H. Cobbs.

(To be continued.)

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<sup>57</sup> 56 Fed. R. 368.

# YALE LAW JOURNAL

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"THE bar has degenerated," says a member of one of our highest courts in the course of an after-dinner speech, and *Harper's Weekly* emphasizes this statement in a vigorous editorial of recent date. The pessimist does not have to be convinced that there is only one breed of sheep and that that breed is of the black variety; but we believe that there are many facts which justify one in taking exception to the finding of the learned judge. The average member of the bar may be less of an orator than the average member of a half-century ago, but who will deny that he is more of a lawyer? His speech may be less mellifluent, but his words are more terse and full of meaning; not, however, that the true orator is wanting even in this prosaic generation. There may be numerous instances where "clients are sought, even touted for," and some "young man who honorably declines to accept causes on speculation, or for contingent fees" may be "likely to go without clients," but the fact remains that the weak and disreputable and unscrupulous members of the profession seldom, if ever, have much influence or prominence. Moreover, it is the lawyers of the country who are striving steadily to obtain such uniformity of laws as will actually tend to reduce their practice by lessening business uncertainty and consequent litigation, and by decreasing the volume of law-breaking.

The statement that "questions of procedure are now as delightful to the mind of the average lawyer as questions of merit once were," is best answered by the fact that through the efforts of the bar, procedure has been made less and less technical, and



that, by codification and simplification, causes stand more upon their merits than was ever possible under the common law pleading of the good old days when everything, including the lawyer, was perfect. Let him who accuses the bar of degeneracy follow the work of the American Bar Association (which includes in its membership about one lawyer in every sixty in the United States) to see the great good that the bar is endeavoring to accomplish—for instance, by efforts to make the divorce laws less an object of reproach and scandal, to formulate a code of criminal procedure, such that the guilty may be brought more surely and speedily to justice, to simplify the organization of the Federal courts, and to raise the standard of legal education.

If the people would trust the bar as they should, the country would be better governed. There is great necessity for legislation that is really effective, and more lawyers are needed in the making of laws, as the most cursory examination of the average legislation will show.

As to the statement that the law has become less professional and more commercial, we reply that the same may be said of some other professions. Our government, for example, has become a great business institution, managed largely on business principles; and, if the lawyer has become a little less of a theorizer and a little more of a business man, it is only a necessary consequence of a great economic and social revolution that affects us all. This is an age of common sense, when false "professional dignity" counts for nothing, and things are accomplished with as little bluster and red tape as possible.

The lawyer has lost none of a proper degree of dignity; he is as worthy of respect as ever, and never was a more potent force for good than he is to-day.

\* \* \*

THE Interstate Commerce Commission furnishes the example of a tribunal endowed with plenary power to effect its object but gradually shorn of that power by the decisions of courts till its usefulness is well-nigh destroyed. The eleventh report of the commission, just issued, is of particular interest in view of the strenuous efforts of the Joint Traffic Association to have Congress amend the Interstate Commerce Act so as to legalize pooling. The burden of the report is a plea for power sufficient to enable the commission to deal effectively with the abuses that it was created to prevent. The commission declares its present inability to enforce the clauses of the Act relating to unfair and

discriminating rates, and calls attention to what must be the outcome of the divesting of its powers by the courts, namely, the limitation of its work in the future to the mere investigation and making public of wrongs by carriers.

As to the interesting question of pooling, which has had the attention of the courts to such an extent within the past few years the commission seems to be no more unanimous than are the judges with regard to the desirability of permitting combinations of railways to make rates. The report says that the commission are not entirely agreed as to the wisdom of permitting pooling, but the majority are inclined to recommend that the experiment be tried, but only under condition that the commission or some other tribunal be "at the same time invested with adequate powers of control." The report does not, then, favor the granting of the pooling privilege in the broad sense of the term and states most emphatically that the commission is "unanimous in the opinion that to overturn the Trans-Missouri decision, to repeal the Fifth Section of the Interstate Commerce Act, and enact in its place a pooling bill, thereby permitting and inviting *unlimited* combinations between carriers, would be little better than a crime against the people of the United States."

As the people, the consumers, ultimately pay the freight, their interests demand that, if pooling be legalized it be also properly restricted. No trust can work so much evil as a combination of railways; no trust can have such wide-reaching influence, nor affect so many different persons or things; and no trust is so supreme within its own sphere. Hence, the folly of giving the carriers absolute power to make rates, when there is such a temptation to overlook the public under the natural impulses of self-interest.

There is most certainly need of a tribunal to regulate interstate commerce, and if the commission is to be anything more than a name there must be some sanction to enforce its authority. We believe that Congress will increase the power of the commission so that it can effect a more rigid and impartial enforcement of the Act to Regulate Commerce.

## COMMENT.

The recent trial of Bram for the murder of Captain Nash in July, 1896, was one of the most remarkable criminal trials in our history, involving questions that no court ever had to deal with before. The reversal by the Supreme Court (18 Sup. Ct. Rep. 183) of his conviction below was perhaps not unexpected by many members of the bar who followed the course of the trial. But it was generally thought that the reversal would be on other grounds. The ground was that a certain confession obtained from Bram at Halifax was not voluntary and hence not admissible. Power, a police officer at Halifax, had Bram brought into his private office and then examined him alone, having first stripped him of his clothing, but making no threats nor offering any inducements to him. Power said to him, "Bram, we are trying to unravel this horrible mystery. Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder." Bram said, "He could not have seen me. Where was he?" "He states he was at the wheel." "Well, he could not see me from there." "Now, look here, Bram. I am satisfied that you killed the captain, from all I have heard from Mr. Brown. But some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it."

This conversation was offered only as a confession and hence, in determining its admissibility, it is not necessary to consider the measure of proof resulting from it. The protection against the admission of voluntary confessions is contained in the Fifth Amendment, that no person "shall be compelled in any criminal case to be a witness against himself." But what amount of proof is necessary to show an involuntary state of mind from the operation of hope or fear must depend in each case on its peculiar circumstances. Analogy and similarity are of little help here. "The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary—that is to say, that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent." All the leading

cases, English and American, on what words are sufficient to constitute an inducement and thus render the confession involuntary, are reviewed. The majority of the court then held that "the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrow any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. \* \* \* To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial, and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused."

The brief dissenting opinion of Mr. Justice Brewer in which Mr. Justice Brown and the Chief-Justice concur, is very strong and forcible and will carry conviction to many minds. But as the question is so largely one of fact and the decision must rest on the peculiar circumstances of the case, it illustrates only how differently the same circumstances will be interpreted by different persons.

Since international expositions are not events of common occurrence, rarely taking place with greater frequency than once in a generation, any case involving the rules and care necessary in the management of such affairs must be of interest. On account of the near proximity of the Paris Exposition in 1900 the case of the *French Republic et al. v. World's Columbian Exposition*, 83 Fed. Rep. 109, is worthy of notice. The facts were very simple—the French exhibits injured being in the Manufactures Building, which had a wooden sidewalk upon its roof. This walk rendered the roof much more inflammable; it was offset, however, by water in a standpipe, kept under pressure by means of pumps. After the close of the Fair, and before the exhibitors had had time to remove their goods, they were injured by sparks and brands from the burning sidewalk on the roof, such burning being due to the lack of water under pressure in the standpipe. The director general had issued notices that the management would take all due precautions, but would be in no way responsible for loss, from whatever cause occurring. While the characteristics of bailment apply in some

respect to the relations of exhibitors and those managing the exposition, still the exact relationship between them has never been hitherto judicially defined. The exhibits were of such a nature as to render it impossible to replace many of them in case of their destruction. Therefore, the management was in no way excused from continuing its protection for such time after the close of the exposition as to give the exhibitors a reasonable period in which to remove their goods. The degree of care requisite was well set forth in Judge Grosscup's opinion: "The management of the Exposition was under legal obligations to safeguard, by the highest intelligence and protection compatible with the ephemeral character of the buildings, the exhibits of the plaintiffs, and such obligation is not escaped by the exempting clauses contained in the regulations promulgated by the director general."

## RECENT CASES.

## CONTRACTS.

*National Banks—Guaranty.—Commercial National Bank et al. v. Pirie et al.*, 82 Fed. Rep. 799. A cashier of a national bank, by order of the directors, to secure a personal debt contracted by the president, gave the bank's guarantee. Counsel for the plaintiff contended that this action was within the implied provisions of its charter. *Held*, that a board of directors of a national bank cannot bind it by contracts of suretyship or guaranty which are made for the sole benefit of others, and that the action of the cashier was *ultra vires*. The national banking act confers no such authority in express terms or by fair implication, and the exercise of such power would be detrimental to the interests of the stockholders and depositors. *Norton v. Banks*, 61 N. H. App. 52; *Bank v. Smith*, 40 U. S. App. 690.

*Attorneys—Retainer—Assisting in Prosecutions.—McCurdy v. N. Y. Life Ins. Co.*, 72 N. W. Rep. (Mich.) 996. 3 How. Ann. St. § 557, prohibits any attorney from prosecuting or aiding in prosecuting "any person for an alleged criminal offense where he is engaged or interested in any civil cause or proceeding depending on the same state of facts against such person directly or indirectly;" and 1 How. Ann. St. § 560, prohibits any prosecuting attorney from having the assistance of any counsel "who has received any compensation from any person \* \* \* interested in prosecuting the person charged with felony." *Held*, that these statutes do not prohibit a lawyer from recovering for professional services rendered to a corporation in the preparation and trial of a criminal case set in motion by the complaint of an officer of said corporation. There is no provision in the statute requiring the prosecuting attorney to appear in examinations in criminal cases in justice court except when requested to do so by the examining magistrate (How. Ann. St. § 552); and if plaintiff appeared in the justice court at defendant's request, there is nothing that will preclude him from recovering for the services rendered.

*Husband and Wife—Separation—Grounds.—Fitzpatrick v. Fitzpatrick*, 47 N. Y. Supp. 737. Under a statute which provides that "cruel and inhuman treatment" shall be ground for separation between husband and wife;" *held*, that proof of angry, contumelious, and degrading reproaches by the husband, applied continuously and without provocation, are sufficient to sustain a decree of separation in favor of the wife without sacrifice of her right of support. That inhumanity may be evinced and cruelty inflicted by verbal outrage as well as by bodily abuse, see *Lutz v. Lutz*, 9 N. Y. Supp. 858; *Straus v. Straus*, 67 Hun. 491, 492, 22 N. Y. Supp. 567; *Atherton v. Atherton*, 82 Hun. 179, 31 N. Y. Supp. 977.

*Contracts of Employment—Construction.—Speeder Cycle Co. v. Terters*, 48 N. E. (Ind.) 595. Defendant corporation agreed to employ plaintiff until its factory was completed, but discharged him before that time. *Held*, that such a contract constituted a hiring at will, determinable at the election of either party. The rule "*certum est quod certum reddi potest*" applies only where there is some means by computation, measurement, etc., that that which is uncertain may be made certain (*Becker v. Ry Co.*, 46 N. E. 685).

## NEGLIGENCE.

*Carrier—Injury to Passenger—Contributory Negligence.*—*O'Donnell v. Louisville & N. R. Co.*, 42 S. W. Rep. (Ky.) 846. A person who voluntarily sits by an open window on a moving train cannot recover for an injury sustained from flying cinders on the ground that the window was out of repair and could not be closed, if he knew, or by the exercise of ordinary care, could have known that there were seats with protected windows. But the court was also of the opinion that if the complaint in this case had been that the cinders were thrown from the locomotive when, by the use of proper screens they could have been stopped, a different question would have arisen—it not being negligence *per se* for a passenger to sit by an open window.

*Negligence of Fellow Servant—Liability of Master—Notice.*—*E. T., V. and G. R. Co. v. Wright*, 42 S. W. Rep. (Tenn.) 1065. Knowledge acquired by a conductor, while in charge of a train, of the recklessness and incompetency of his engineer is notice to the company, and is sufficient to fix the liability of the company for an injury done to a fellow servant through the engineer's recklessness and incompetency. It is not necessary that notice be brought home to one having power to discharge the engineer, but is enough if known by the engineer's immediate superior and the representative of the company in charge of the train (*Railroad v. Spence*, 23 S. W. 211).

*Action for Wrongful Death—Defense—Contributory Negligence of Sole Next of Kin.*—*Consolidated Traction Co. v. Hone*, 38 Atl. Rep. (N. J.) 758. In an action brought to recover damages against a traction company for negligently causing the death of plaintiff's infant son the court were equally divided upon the question (decided in plaintiff's favor in the lower courts) whether the traction company could defeat the action if it could show that the death in question was in part the result of the negligent conduct of the sole next of kin—*i. e.*, the plaintiff in this action, although such negligence is not to be imputed to the infant.

## STATUTES.

*Collision in Detroit River—Canadian Statute—Change of Course.*—*Union Steamboat Co. v. Erie Co.*, 82 Fed. Rep. 817. An action was brought by the owners of a vessel for damages from a collision with another vessel occurring on the Canadian side of the Detroit River. It appeared that claimant vessel gave the proper signals and that the defendant vessel, after acting accordingly for a time, finally disregarded them and gave no signals herself. *Held*, following *The North Star*, 22 U. S. App. 242, 10 C. C. A. 262, that in the absence of proof of the statute and that the captains of each vessel acted thereon, the contention that the Canadian statute of navigation should govern was unfounded, and that the proper rules of navigation were those of the Revised Statutes of the U. S. Also, the fact that the plaintiff vessel, whose duty it was to hold her course, temporarily abandoned it to avoid obstructions known to the other vessel, did not violate her duty so as to prevent her recovery.

*Statutes—Construction—Railroads—Actions Against Receivers.*—*Ware v. Platt*, 48 N. E. Rep. (Mass.) 270. An action was brought for damage resulting from fire caused by the railroad for which the defendants were receivers. The statute applying in this case read as follows: "Every railroad corporation and street railway company shall be responsible in damages to a

person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route, for which it may be so held responsible, and may procure insurance thereon in its own behalf." The respondents defended on the ground that the statute did not apply to them as receivers, but that the corporation itself was liable. *Held*, that the statute was remedial and applied in this case. Remedial statutes are to be construed liberally, and so as to advance the remedy and carry out the object in view in their enactment. Cases may come so obviously within the equity of a statute that it would be unreasonable to suppose that they were not intended by the legislature to be embraced within it, though the literal sense of the language used might not include them.

*Municipal Corporations—Power to Prohibit Liquor Traffic—Repeal of Statutes.*—*Bailey Liquor Co. v. Austin*, 82 Fed. Rep. 785. An act of the legislature and an ordinance of the town council of G— forbade the sale of intoxicating liquors within the limits of the town. State constables and others acting under the authority of the town council seized a quantity of wine, whiskey, and beer offered for sale in original packages. *Held*, that they acted within their power and that such act and ordinance were a valid exercise of the police power. The above act and ordinance were not repealed by the "Dispensary Law." Repeals of statute by implication are not favored and can never be admitted when the former can stand with the new act. *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255.

*Assignment for Benefit of Creditors—Constitutional Law—Impairing Contracts—Judgment by Warrant of Authority.*—*Second Ward Sav. Bank of Milwaukee v. Schrauck*, 73 N. W. Rep. (Wis.) 31. Ch. 334, Laws 1897, relating to voluntary assignments, provide that all attachments, levies, garnishments, or other processes against an insolvent debtor, within ten days prior to an assignment for the benefit of creditors, made by such debtor, shall be dissolved and the property attached or levied upon be turned over to the assignee. *Held*, void, as impairing the obligation of contracts, in so far as it applies to notes and warrants of attorney, and judgments and valid executions to enforce the same. Such statute, though acting on the remedy alone, is as void as if it affected the obligation of the contract, as in effect it substantially impairs the obligation of the contract itself. *Edwards v. Kearney*, 96 U. S. 600; *Green v. Biddle*, 8 Wheat. 1; *State of Tennessee v. Sneed*, 96 U. S. 69, etc. *Casoddy, C. J.*, dissenting, held that the act was such an insolvent law as the State legislatures were held to be empowered to pass in *Ogden v. Saunders*, 12 Wheat. 213-219. State statutes may impair the remedy on an existing contract, without necessarily impairing the contract itself. *Von Baumbach v. Bode*, 9 Wis. 569; *Sturgis v. Crowninshield*, 4 Wheat. 122; *Morely v. R'y Co.*, 146 U. S. 162, 13 Sup. Ct. 54. The act in question does not undertake to discharge the insolvent debtor, but merely to prevent preferences out of such of the insolvent's estate as existed at the time of making the assignment.

#### MISCELLANEOUS.

*Wills—Rights of Life Tenants—Stock Dividends—Income.*—*McLouth v. Hunt*, 48 N. E. (N. Y.) 548. An action was brought to procure a judicial construction of a will providing that the estate be divided into three parts and that the same should be held for the benefit of the testatrix's three grandchil-



dren who, after majority, were to receive "the full income" annually until thirty-five years of age, when they were to receive the principal. In case of death of either grandson under thirty-five leaving issue, his share was to be paid to such issue. A part of the estate consisted of United States bonds commanding a premium at the testator's death of 28% and another part consisted of stock in a corporation which after the creation of the trust estates declared a stock dividend. *Held*: (1) that no part of the income of the former could be set apart to secure the remainder sum against loss caused by depreciation in the value of the bonds as they approached maturity; (2) that "the full income" included stock dividends. Cases contrary to the first holding are *Trust Co. v. Eaton*, 140 Mass. 532; *Reynal v. Theband*, 23 N. Y. Supp. 615; but the right of authority is that the intention of the testatrix, as expressed in the will, must govern. *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778; *Peckham v. Newton*, 15 R. I. 322. In respect to stock dividends many authorities are to be found on each side. Contrary to the above decision are *Minot v. Paine*, 99 Mass. 101; *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, and many of the old English cases. The English and Massachusetts doctrine, however, has been repudiated in *In re Kernochan*, 104 N. Y. 615; *Monson v. Trust Co.*, 140 N. Y. 498, 35 N. E. 945.

*Railroads—Who are Passengers.—Missouri K. & T. Ry. Co. of Texas v. Williams*, 42 S. W. Rep (Texas) 855. The defendant in error, with the *bona fide* intention of becoming a passenger on a train and not having time to purchase a ticket, jumped on the train while it was in motion and at the most convenient place, which was the front end of the baggage car. The fireman, seeing him there and thinking him a trespasser, threw hot water on him, forcing him to jump off, whereby he broke his leg. In an action for damages it was *held* he could not recover. In order to raise an implied contract of carriage the person desiring to be carried must board the train with the *bona fide* intention of becoming a passenger; be ready and willing to pay his fare when called upon; and also take passage upon the part of the train provided for carrying passengers (*Merrill v. Railroad Co.*, 139 Mass. 238).

*Order to Produce Receipts—Noncompliance.—Flemming v. Lawless et al.* 38 Atl. Rep. (N. J.) 864. Upon a motion in behalf of defendants to open a final decree, the petition therefor was based upon the discovery by the defendants of a certain receipt alleged to have been made by complainant's agent, and not in possession or control of defendants when the cause was tried. Objection to the motion was made on the ground that defendant having pleaded payments and alleged that they had "vouchers ready to be produced and proved," complainant, being ignorant of such vouchers, had procured an order in accordance with Sec. 157 of the common law practice act, requiring defendant to produce "the receipts, vouchers, and other evidence in writing of the payment" of the sums as set forth in the answer. Defendant, at the time of the order, had in his possession separate receipts (one of which is the one lately discovered, and the foundation of this petition), but produced instead of these a consolidated receipt, purporting to be for all the payments. *Held*, that defendant cannot now produce the separate receipt, in view of the practice act above mentioned (sec. 157), providing that a paper shall not be given in evidence where a party has refused to comply with the order to produce it.

*Voting Precincts—Establishment—Indians—Citizenship.—State ex rel. Tompton et al. v. Denoyer et al., County Com'rs*, 72 N. W. Rep. (N. D.) 1014. Indians and persons of Indian descent, residing on lands allotted to them in severalty, and upon which preliminary patents have been issued, in accordance with the "Dawes Bill" passed by Congress in 1887, are citizens of the United States and qualified electors of the State, and it was the duty of the county commissioners of the county in which such lands are situated to establish a voting precinct within and for said lands. The "Dawes Bill" declares that such Indians "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside." For a similar case see *State v. Norris*, 55 N. W. (Neb.) 1086.

*Towns—Orders—Validity—Power of Boards.—Goodwin v. Town of East Hartford et al.*, 38 Atl. Rep. (Conn.) 877. The board "for the care, maintenance and control" of a highway across a river, provided for by Act May 19, 1887, was to consist of the first selectmen of the towns designated as specifically benefitted by the highway; was authorized to apportion among the towns the expense of repairing and maintaining the same, as well as any damages resulting from its defective condition; and was declared by the act to be, for the purposes thereof, a body politic and corporate. *Held*, such board has no implied power to employ agents to procure legislation whereby the act of 1887 should be repealed, the State to assume the duty of repairing and maintaining the highway; nor has it power to issue orders binding on the towns for the expenses of such agents. This is true whether the board be considered as a municipal corporation, or simply as a device to enable the representatives of the towns to perform a municipal duty imposed on the towns jointly. In *Farrell v. Town of Derby*, 58 Conn. 234, 20 Atl. 460, it was held that a town may lawfully expend money it has raised by taxation to protect its corporate integrity, etc., from adverse legislation. But the doctrine of this case must not be stretched into an authority justifying a town to embark in legislative attacks on other corporations, because the town might think itself benefitted thereby.

*Criminal Law—Instructions—Error—Reasonable Doubt.—Hoffman v. State*, 73 N. W. Rep. (Wis.) 51. *Held*, error to define "reasonable doubt," in instructing a jury in a murder trial, as an "intelligent opinion or conviction that the guilt of defendant has not been satisfactorily proven." Such instruction is vicious in that it seems to minimize the significance of a mere doubt by saying that, in order to be reasonable, the doubt must rise above the condition of a mere doubt into a realm of certainty and conviction.

*Nuisance—Liability of Tenant—Lease for Years.—Meyer v. Harris et al.*, 38 Atl. Report (N. J.) 690. The lessee of a term for years is not liable to third persons for damages caused by his maintaining upon the demised premises in the condition in which it was at the beginning of the term a structure which is a nuisance. The remedy is against the owner. But where the tenant is a lessee for a term of 999 years he is, for all practical purposes (*Black v. Canal Co.*, 24 N. J. Eq. 465), the owner thereof, and third persons may have their remedy against him for maintaining such nuisance.

## BOOK NOTICES.

*Indirect and Collateral Evidence.* By John H. Gillett, Judge Thirty-First Judicial Circuit of Indiana. Sheep, pages xli., 407. Bowen-Merrill Co., Indianapolis and Kansas City. 1897.

Judge Gillett's book is the product of an original research into Evidence, and his independence is shown by the topics which he has emphasized and excluded. Some topics not strictly a part of Evidence such as Presumptions, Judicial Notice and Burden of Proof, are not treated, and also Primary and Secondary Evidence, and evidence in particular actions. On the other hand, nearly a half of the work is given up to collateral evidence and *res gestae*. An attempt is here made to put these subjects, hitherto slightly treated, upon a scientific basis, and the result is most satisfactory. The topic of Declarations is also most thoroughly worked over. The leading cases are discussed, the views of prominent book and magazine writers criticised, and the logic of the subject brought out in a manner most acceptable to the reader.

*Bailments, Including Carriers, Innkeepers and Pledge.* By James Schouler, LL.D., Professor in the Boston University Law School. Third edition. Law Sheep, pages lxxiv., 782. Little, Brown & Co., Boston. 1897.

To the student, and we can speak from his standpoint with greater confidence, Professor Schouler's works are always welcome. His experience as a teacher gives clearness, and his scholarly tastes lead him to historical researches which aid the student materially in getting what must be at best only a bird's-eye view of the law. From this, however, we would not have it understood that Bailments and Carriers is a discursive treatment of the topic. The work is thorough, and to an agreeable extent philosophical. The subject of Carriers, which is treated under the head of "Exceptional Bailments for Mutual Benefit," occupies a full half of the book. His method of treating this branch of the law is best stated in his own words, "Unless we determine to take no precedent for more than it is worth, to keep fast hold of fundamental bailment principles, and bear constantly in mind that this transportation of movable property to and fro \* \* \* is but a bailment, and that the present idiosyncrasy simply consists in an extraordinary degree of responsibility to which public policy chooses to subject the class of bailees known as Common Carriers, we shall lose our most needful clue." The cases cited—about 1,800 in number—are few as compared with the modern "treatise," but are selected with a view to being instructive, illustra-

tive and authoritative, rather than exhaustive. A chapter has been added on the Interstate Commerce Act of Congress; which, with other matter, has increased the book about one-tenth.

*A Manual of Legal Medicine.* By Justin Herold, M.D. Cloth, pages xv., 678. J. B. Lippincott Company, Philadelphia. 1898.

Dr. Herold has put into a small space a vast amount of practical information on the subject of medical jurisprudence. His object is to furnish a treatise for the legal and medical practitioner and student, less voluminous than the ordinary treatise and fully up to date. The tabulated statements giving precise directions and criterions for guidance in reaching conclusions on important questions—as whether a wound was inflicted before or after death—are a marked feature. The book is divided into two parts. The first relates to toxicology; the second to forensic medicine proper. Insanity and its allied branches are the only topics not treated. The style is clear and concise, and the strictly legal portions accurate. The appendix contains a number of illustrative cases.

*Notary's and Conveyancer's Manual.* By Florien Giauque, of the Cincinnati bar. Second revised edition. Law sheep, pages viii., 389. Robert Clark Company, Cincinnati. 1897.

Notaries and conveyancers are too often ignorant of the formalities to be observed in the performance of their duties. Mr. Giauque has gathered together in a small compass the statutes of the various States and the common law governing acknowledgments, depositions, affidavits, negotiable instruments, and the execution of deeds. This information is put in a convenient and practical form and well indexed. Since the publication of the first edition of this manual, several territories have become States, and a new Territory has been formed. These changes and the many caused by such tendencies as place men and women on the same basis as to property rights and secure uniform legislation on several subjects, have made necessary and rearrangement and rewriting of this book. This edition covers all the laws and forms of each State and Territory. It is deserving of even greater success than the first edition.

*Crime and Criminals.* By J. Sanderson Christison, M.D. Cloth, pages 117. The W. T. Keener Company, Chicago, 1897.

The articles here collected originally appeared in the *Chicago Tribune*. While they do not constitute a systematic treatise on the subject of criminology, they present the points of most importance in a form suited to the general reader. Some twenty-three criminals of note are described and this description illustrated by photographs showing particular criminal features. The book closes with drawings of "the degenerate ear," which remind one forcibly of Max Nordau.

## MAGAZINE NOTICES.

The following are some leading articles which have appeared in legal publications during the last month:

*Albany Law Journal :*

- Dec. 11.* Remedies to Govern the Right to follow Property Wrongfully Taken or Converted, as against the Wrongdoer's Estate, . . . . . Alex. Hirschberg.  
*Jan. 1.* Government by Injunction, . . . . . Percy L. Edwards.  
*Jan. 8.* Eloquence at the Bar, . . . . . W. L. Miller.

*Central Law Journal :*

- Dec. 10.* Seizure of Fixtures Under Legal Process, . . . . . L. D. Landornn.  
*Dec. 17.* Power of Municipality to Declare what Constitutes a Nuisance, . . . . . Eugene McQuillin.  
*Jan. 1.* Penalties and Liquidated Damages, . . . . . Seymour D. Thompson.  
*Jan. 8.* The Summary Jurisdiction of Courts over Attorneys at their Bar, and the Power to Compel Good Faith toward Clients and a Restitution of Funds or Property Converted or Wrongfully Withheld, . . . . . F. W. Babcock.  
*Jan. 15.* Eminent Domain and Taxation as Related to the Use or Purpose for which Property is Taken or Taxes Levied, . . . . . W. L. Hand.

*Green Bag—January :*

- Style in Judicial Opinions, II., . . . . . H. C. Merriman.  
 Jury Challenge.

*American Law Register—January :*

- Strikes and Courts of Equity, . . . . . W. D. Lewis.  
 Unconstitutional Legislation Upon the Extinguishment of Ground Rents, . . . . . R. M. Cadwalader.

*Virginia Law Register—January :*

- Government by Injunction, . . . . . S. S. P. Patterson.

*New Jersey Law Journal—January :*

- The Origin of New Jersey's Board of Chosen Freeholders, . . . . . F. B. Lee.

*Harvard Law Review—January :*

- The History of Trover, . . . . . J. B. Ames.  
 The Judicial Use of Torture, II., . . . . . A. L. Lowell.  
 Registration of Title to Real Estate, . . . . . H. W. B. Mackay.  
 Warranties and Similar Agreements, . . . . . E. F. McClellun.

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## CODE PLEADING: THE AID OF THE EARLIER SYSTEMS.

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In the preface to Professor Tyler's edition of Stephen on Pleading, it is stated that "it is especially important that the students of law be trained in common law practice, and be convinced of its wisdom as a means of administering justice, in order that as men who influence public opinion they may if possible, gradually restore common law pleading to its former efficiency in the courts. At all events their training in common law pleading will enable them, in States where it is established, to relieve in some measure the administration of justice from the embarrassments with which it has been environed by codes. For a knowledge of common law pleading is not only of importance in States where wisdom has retained it, but also in States where it has been abolished." While the value of the knowledge thus advocated should always be clearly apparent to those whose preparatory studies in the law have included the common law and equity methods, it is by no means as fully recognized by those whose legal training has been entirely under the code system. The views of Professor Tyler above quoted may be taken as true at the present time to the extent that the importance of the common law training still exists as fully as it did thirty-seven years ago, though not entirely for the reasons then advanced, and that, to either the student or the practising lawyer, such training cannot but be beneficial for the reason that, with but one single exception, it is believed, and aside from formal and technical requirements, there is no rule regulating the substance of pleadings under the codes which is not either taken directly from the older system, or framed by analogy in

the application of the same principles. The experience of the past thirty years has demonstrated that the codes have by no means brought about that perfect completeness and simplicity in all forms of legal procedure hoped for and predicted by their supporters, and expected, perhaps, during the earlier years of their adoption. Much has been written by way of judicial opinion to elucidate and determine what rule of guidance should be followed under their apparently clear and simple provisions, often with but little effect beyond disposing of the particular controversy, and not a little has been put forth by text-writers to the same end, though not always with a full measure of success. There has also been some discussion as to the meaning of certain requirements of the codes which, while apparently plain, have involved in their application much confusion and doubt. No one, however, it is believed, has at any recent time denied the importance, or at least the benefit, of the common law and equity training to the lawyer practicing under the codes, and it is the purpose of the writer to endeavor to indicate some of the points of contact between the earlier and later systems, as well as the indirect influence exerted by the former in the presentment of controversies for judicial determination.

While it is true that under the methods now pursued the law schools generally place the study of the common law system at the commencement of the course on pleading, and while lawyers without a law school training, but whose practice began far enough back for them to be affected by the older methods, recognize its importance, it is also true that students to some extent regard both systems as practically obsolete so far as code procedure is concerned, and many lawyers, not graduates of any law school, are not only of the same opinion but often have no knowledge whatever of either, their studies having been limited to the acquisition of such of the provisions of the particular act as would enable them to obtain admission to the bar and thereupon "hang out a shingle." It is not intended to make any general criticism upon the members of the profession, but in noticing the course of trials of civil causes in courts proceeding under the codes, it will often be evident that the pleadings in the different suits have apparently been drawn with a main object of economizing both time and labor, and with but slight attempts toward any logical or concise method of statement. So true is this at times that it would seem as if the end in view had been to reverse the cardinal principle that the pleading should be framed for the proper information of the defendant

as to the case to be established against him in evidence, and instead of thus informing him to mislead and confuse him to such an extent as to render him helpless when actually confronted by the testimony at the trial. The method of statement followed (I refer only to the statement of the *facts* constituting either claim or defense, and not to formal or technical allegations) is but too often a statement of "facts" as prescribed by the codes, made as the lamented Charles O'Connor expressed it, "just as any old woman, in trouble for the first time, would narrate her grievances," licked into a semblance of orderly shape by reference to some book of so-called "forms" or to the results of the labor of a brother practitioner, and telling the opposing party much more or less than he requires and is entitled, for the purposes of his defense, to know. In other cases the method adopted consists of a mixture of the necessary "facts" or, as convenient, the evidence of such facts, and a series of legal conclusions presented in perfect good faith as convincing and ultimate facts, interwoven with such argument or explanation as seems necessary to complete and solidify the whole; and in still others, a form is taken bodily, chiefly because it is offered and labelled as appropriate by some compiler who is assumed to know, and used in blissful ignorance as to why its formal and jurisdictional allegations are retained in one case and not in the other, or whether they fit the particular case at all. The result of these careless or inefficient methods must always be the same. The adversary is not thought of save to be misled or mystified; the actual evidence by which the pleading is to be sustained and of which it is supposed to present the ultimate facts, is often lost sight of or slighted for some sweeping jurisdictional allegation or some graceful period; and last, but not least, the court is saddled with the extra labor of rescuing from the mass of chaff and useless repetition, the real issues to be disposed of.

The causes of the conditions I have mentioned seem to rest in two things. One is a reliance on the code alone, either from a want of knowledge of the principles and rules of the older systems, or from a disregard of such knowledge if already acquired; while the other and perhaps the most important, lies in the difficulty of complying with the common directions of the codes that the complaint or petition must contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition, but not the evidence of such facts. As to the cause first mentioned, it is of course true that both students



and lawyers will be responsible, each to himself only, for any failure to profit by a sufficient training in this branch of legal procedure, and it is no less true that many have regarded and will continue to treat the common law and equity systems as of no immediate importance in code practice, and to be examined only in connection with controversies in the Federal courts, or, possibly, in a State court having a common law or chancery jurisdiction. It is to such, as well as to those to be next referred to, that the suggestions of this article seem proper, and to such they are commended.

The second cause before mentioned, is one which has been fruitful in the refinements and discussion it has caused, inasmuch as the requirement of the practice acts that the pleader shall allege facts and at the same time not plead evidence, has often compelled lawyers, in their anxiety to so frame their pleadings as to remain in court and at the same time fully set forth the cause of action they advocated, to present a series of statements of fact, covering all possible grounds directly or indirectly connected with their case, in order to avoid the consequences of a variance between pleading and proof in the event of strict rulings by the court as to the issues involved. Probably more of the bad pleading that may be noticed arises from this than from any other cause; and the provisions of the codes directing that pleadings be liberally construed, while sometimes effective to relieve one from the consequences of carelessness or ignorance, are by no means to be relied on to help out any serious errors or omissions in the statement of the substance of either cause of action or defense. This requirement as to stating facts seems to have been about the only really new departure, in framing the codes, from what was before required, and was characterized by Mr. O'Connor as "an attempt at an absolute impossibility in prescribing the rule of pleading," substantially and in effect prohibiting the statement of conclusions in law or in reason from the facts of the case, and at the same time forbidding the statement of the evidence tending to prove such facts. According to the decisions interpreting these provisions, the facts referred to in the statute are "physical facts" (whatever that may mean in a legal sense), and those which the evidence to be offered at the trial will prove—not the evidence required to prove the existence of such facts. And it has been also held that the facts in question are in general such as were required to be stated in pleadings at common law—that is, issuable and material facts, essential to the cause of action or defense, and

not those detailed and minute circumstances which may go to establish such issuable facts. As to the exact meaning of this requirement of the codes, there has been and may continue to be some confusion, the interpretation given being often controlled by the nature of the case (as shown by the different methods of alleging fraud and negligence), or perhaps, by the tendency of the court toward strictness or liberality in applying the proper rules of construction. The rule against pleading evidence, moreover, is not an original code rule, so to speak, but one taken from the common law, and also recognized under the equity system except where the complainant's allegations are framed with the object of obtaining a discovery from the defendant. The difficulty lies in its application to particular cases, the ultimate facts to be stated being often really conclusions of law or fact that are not readily distinguishable as such. It would be beyond the limits of this article to enter into any comparison of the decisions on this point, and perhaps the best summary of the situation may be made by taking the statement that "some latitude of interpretation is to be given to the term 'facts' when used in a rule of pleading. It must of necessity embrace a class of mixed facts in which more or less of legal inference is admitted," with that of the court, in an early New York case, that the facts required by the codes to be stated in pleading are in general the issuable and material facts required to be stated at common law—that is, that in a legal action under the codes the facts constituting the cause of action must be at least what the common law procedure would have required; and in a suit for equitable relief the same facts would be necessary as in a bill in equity for relief under the older chancery system. But however the provisions in question may be construed, it is certainly not to be greatly wondered at that, in view of the uncertainty as to what is actually required, and the consequent fear of being thrown out of court on a demurrer, or subjected to the consequences of a variance at the trial, lawyers should often seek to place their causes on safe ground by so extending and broadening their statements of fact as to enable them, under the rules of construction applicable, to maintain their standing in court upon the evidence they are finally able to present.

It is not the purpose of this article to advance the theory that a knowledge of the early methods and rules of pleading will afford any specific or immediate remedy for the faults already referred to, or prevent the consequences of carelessness or willful neglect, but there can be little doubt that such know-

ledge, valuable in any case from a historical standpoint, is much more so in giving a familiarity with the sources from which the principles, at least, of our present code procedure were derived and consequently with the reason why allegations in common use are made. The codes have abolished the older forms of procedure, substituting a single form of action for all controversies, whether legal or equitable, and the formal and technical portions of the older method are therefore of no further importance in this connection, particularly the fictitious allegations as to venue and the taking in trover and conversion, and the well-known "common counts" are no longer used as formerly, though still, it seems, available. It will, therefore, only be necessary to examine the rules as to the substantial allegations of the pleadings, both now and formerly in force, and note the relation between them and the extent to which the older rules, or the principles upon which they rest, are active in the structure of pleadings under the codes.

Taking the rules stated as effective in connection with code pleading, let us first examine, as the natural order, those determining what facts must not be given in the statement of the cause of action, in either complaint or petition. Five rules have been here laid down by Mr. Bliss, covering presumptions of law and of fact, matters judicially noticed, anticipating defenses, and pleading evidence, conclusions of law, or immaterial or irrelevant matters. In each instance we find the rule as given is practically a re-statement of that in force under the common law system, and the supporting principle is in each case the same. Thus, facts which the law presumes, as the absence of criminal and improper motives in acts done, or the proper and lawful conduct of all men in their business, need not be alleged, and the same is true of facts which the law will necessarily imply from the existence of other facts. So the allegation of matters of which the court takes judicial notice, as the laws of nations, public statutes or treaties, or matters of general notoriety, etc., is not required, nor is the plaintiff allowed to anticipate a defense by stating facts which would more properly come from the other side, nor to plead evidence which should be presented only at the trial. He is also prohibited from stating conclusions of law, or encumbering his pleading with matter that is irrelevant and immaterial to the issues to be examined. These rules are all to be found in the common law system, though perhaps not wholly in the same words, and also, for the most part, in that of the courts of chancery, although, as we have seen, the rule as to

pleading evidence does not apply in equity as to allegations of the bill which are framed to obtain a discovery.

Again, taking the code rules as to the facts to be stated, we find first the substance of the common law rule that the pleadings must show title or authority, and in another rule, viz., that "in actions on contract the complaint must show privity," a re-affirmance of the common law principle that privity, where essential to the right of action, must be shown, as well as of the requirement of the equity system that the bill must show a relation between the parties giving the complainant the right to relief in the particular suit against the defendant named. So the rule that "in actions on contract, consideration must be shown," follows directly upon the requirements of the older systems, and that providing that in seeking relief other than by a judgment for money or specific property it must appear that such judgment could not be obtained, is substantially another mode of stating the chancery rule that in order to obtain equitable relief, the complainant's bill must show, on its face, a title or equity to the relief sought. A further rule, that as to persons suing or being sued in a representative capacity, the authority or relation must be shown, is also the application of a principle embodied in the common law rule as to showing title, and the other rules as to certainty and materiality. In regard to corporations, however, there does not seem to have been any positive requirement under either the common law or equity systems, independent of statute, that any allegation should be made as to the legal existence of a corporation, it being regarded as an individual, and suing or defending in its corporate name in the same manner. With this exception, all the rules laid down by Mr. Bliss as to the facts to be stated or omitted are the counterpart of those followed in common law procedure, or are framed by analogy in the application of the same principles, and in these are included all rules of the common law or equity systems under this head, not referable to technicalities or formal requirements which the change to the single form of action has swept away.

Turning now to the rules as to the manner of stating facts, the first of the common law requirements which need be mentioned is that forbidding duplicity, and in connection with this may be taken the equity rule against multifariousness in the improper joinder of different grounds for relief in the same bill. While the practice acts generally permit several distinct and independent causes of action, legal or equitable, to be joined in

the same complaint or petition, if arising out of the same transaction or series of transactions and between the same parties, the principles of the common law and of the later equity rules are clearly applicable, and the causes of action thus stated must each, as in the case of a single statement, be complete in itself, and not embrace distinct and inconsistent grounds for complaint or relief. The four subordinate rules given by Mr. Stephen as exceptions or qualifications to the general rule as to duplicity, are also fully applicable, being rules of substance entirely. Thus, matter which of itself renders a pleading double will have the same effect, though ill pleaded, while immaterial matter or matter of inducement will not cause the fault, nor will a series of detailed facts if establishing but a single point or proposition.

Again, the rules of the common law as to certainty, both principal and subordinate, are applied to their full extent in code pleading, except where the framers of the statute, for the sake of simplicity or brevity, have provided for a special method of statement. Thus, time (not the fictitious venue of the common law) and place, whenever material, are to be stated as at common law, and, as we have already seen, the rule as to showing title is also enforced. Items of quantity, quality and value, whenever material to the issue, must be truly stated, and both persons and property described with sufficient certainty for purposes of identification, accuracy being especially necessary in the case of real property. Of the subordinate rules, those relating to pleading evidence, or matters judicially noticed, or anticipating the defense, or stating presumptions of law or fact, have already been noticed. All are as fully applicable under the codes as at common law or under the equity system, and not less so are the further rules that no greater certainty is required than the nature of the thing pleaded will conveniently admit of, and that less particularity is required in the statement of matter of inducement, or where the facts lie more in the knowledge of the opposing party. So, also, the rule that acts valid at common law, but regulated by a subsequent statute, are to be pleaded the same as before the statute, is still in force.

Taking, further, the common law rules as to consistency and simplicity, as well as directness and brevity, the code system recognizes and applies those forbidding inconsistency, repugnancy, ambiguity, argumentativeness, and alternative or hypothetical pleading, and indirect recitals, as well as that providing that matters are to be pleaded according to their legal operation and effect, though the latter is modified in being made

optional with the pleader. Departure is also prohibited and surplusage is condemned, though the liberal rules of practice generally allow the objectionable matter to be stricken out. Other rules might be mentioned, but as they relate to technical matters connected with the older forms and theories, they have no place in the code system. In the enumeration already given we have covered, though somewhat imperfectly, all rules of the common law system which related to and controlled the substantial statement of the cause of action, nearly all of which are also fully applicable to the system of pleading in equity. It may be added, also, that while the codes are more specific as to the form and contents of the answer, the substance or facts of any defense or counterclaim as well as of any new matter in a reply, should be presented under the same rules of statement as the facts constituting a cause of action.

The foregoing review of the relations between the old and new systems as to the structure of pleadings, has necessarily been too brief for that illustration by decisions which gives the best and most intelligible explanation, but if its suggestions are accepted by any student, or influence any lawyer to turn to the older method for aid in the preparation of his pleadings under the new, the result aimed at will have been accomplished. Much has been written in elaborate explanation of the theory and application of the general provisions of the code as to pleading and practice, and most if not all the text-writers have to a greater or less extent recognized and explained the application of common law and equity rules and principles. All have been obliged to assume, however, that the student or practitioner was familiar with the older methods, and it has been for a long time the belief of the writer that no harm could result from emphasizing the teaching of the law schools, by a few suggestions as to preparing pleadings with reference to the reasons underlying the rules upon which the different allegations are founded. It will often be found that, where the statute is silent, doubt as to the necessity or propriety of particular allegations will disappear upon an examination of the reason of the common law rule in similar cases, and I feel safe in asserting that if any lawyer will frame his allegations of fact, in a complaint or petition under the codes, to fully comply with the requirements of the common law or equity methods in a like case, he need fear no demurrer, provided the statute does not dictate the form of procedure.

Finally, I cannot better close this article than by the words

of the late Professor Cooley, which though written many years ago, seem to be fully applicable to the conditions of to-day: "The works of common law pleading have not been superseded by the new codes which have been introduced. \* \* \* A careful study of these works is the very best preparation for the pleader, as well where a code is in force as where the old common law forms are still adhered to. Any expectation which may have existed that the code was to banish technicality, and substitute such simplicity that any man of common understanding was to be competent, without legal training, to present his case in due form of law, has not been realized. After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in a logical manner after the rules laid down by Stephen and Gould, is better prepared to draw a pleading that will stand the test on demurrer than the man who, without that training, undertakes to tell his story to the court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little, or of presenting the facts so inaccurately, as to leave his rights in doubt on his own showing. Let the common law rules be mastered, and the work under the codes will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted, in coming to the new practice by the old road."

*Benjamin J. Shipman.*

ST. PAUL, February 3d, 1898.

## THE STUDY OF ROMAN LAW.

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The object of this paper is to suggest the necessity of more general attention being given to the study of Roman law in our institutions for legal education. No apology ought to be required, and yet I feel that I ought to offer one, for bringing up a matter in which the majority of instructors and students take so slight an interest.

It is, I believe, generally conceded that the ever-rising standard of general education and knowledge in the country necessitates a higher standard of professional education among lawyers, if they are to keep pace with the general improvement around them, and retain their old position as leaders of the nation. Our principal law schools have, I think, recognized this, as is shown in the tendency to raise the qualifications for admission, to increase the length of the course leading to the degree, and to establish post-graduate courses in which much attention is directed to the scientific study of law.

Legal education, like every other institution of permanent benefit to society, mounts towards perfection by a process of evolution in which each improvement becomes the stepping stone to, or point of departure for, some further advance in efficiency.

The student of law in the United States is to-day in a more favored position than is the student in any other English-speaking country in the world.

In England, even so far back as the last century, the want of means for acquiring a scientific knowledge of law was keenly felt. Blackstone in the introduction to his commentaries, says, "The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely pernicious consequence. I mean the custom by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law, and placing them, in its stead, at the desk of some skillful attorney, in order to initiate them early in all the depths of practice and render them more dextrous in the mechanical part of business. \* \* \* Experience may teach us to foretell that a lawyer thus educated to the bar in subservience



to attorneys and solicitors, will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded the least variation from established precedents will totally distract and bewilder him; *ita lex scripta est* is the utmost his knowledge will arrive at, he must never aspire to form, and seldom expect to comprehend any arguments drawn *a priori* from the spirit of the laws, and the natural foundation of justice."<sup>1</sup>

The hope expressed by Blackstone for a more systematic and scientific mode of legal education in England has hardly been realized, and indeed the practice he objected to *did* become general. Thus, about one hundred years later, in 1871, Markby, in the introduction to his "Elements of Law," writes as follows: "Until very lately the only study of law known in England was that preparation for the actual practice of the profession which was procured by attendance in the chambers of a barrister or pleader. The universities had almost entirely ceased to teach law, and there was nowhere in England any faculty, or body of learned persons, who made it their business to give instruction in law after a systematic method. Nor were there any persons desirous of learning law after that fashion. Forensic skill, skill in the art of drawing up legal documents, and skillfulness in the advice given to clients, were all that was taught, or learned, by a process of initiation very similar to that in which an apprentice learns a handicraft, or a schoolboy learns a game."<sup>2</sup> And about two years ago, at a meeting of leading lawyers to consider the question of legal education, the Lord Chief-Justice deplored the lack of scientific legal instruction and remarked that the law of England had become "a mere nice discrimination between decided cases."

It seems probable that the system by which the English, and later the American, law has grown and developed accounts for the indifference which, until recent times, has been shown to scientific legal education. "Few persons who have not made a special study of the law can have any notion of the wonderfully uneven manner in which its growth has proceeded. Law being made in this country [England] mostly through litigation, the casual exigencies of litigation determine what parts of it shall be filled up and what left incomplete."<sup>3</sup>

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<sup>1</sup> Introduction to "Commentaries," pp. 31, 32.

<sup>2</sup> Introduction to "Elements of Law," p. ix.

<sup>3</sup> Sir F. Pollock, "Essays in Jurisprudence and Ethics," p. 67.

Law which has grown up in such a chance way would seem, at first sight, incapable of scientific treatment. There is no science, however much convenience, in opportunism. And if our law had indeed been merely the outcome of a mass of judicial decisions made to fit the individual cases adjudged, it would be a hard task for the scientific investigator to bring order out of such chaos. But, happily, the principles underlying these multitudinous decisions are, after making allowance for local customs and institutions, mainly those which underlie every system of jurisprudence known to the civilized world. Maine, in his "Ancient Law," shows how curious has been the actual process by which our law has been developed by judicial decisions, or case law. "When a group of facts comes before an English Court for adjudication the whole course of the discussion assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. Yet the moment the judgment has been rendered and reported we slide unconsciously or unavowedly into a new language, and a new train of thought. We now admit that the new decision *has* modified the law."<sup>4</sup> Maine explains this curious anomaly by the fact that a belief originally existed that there was somewhere "a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."<sup>5</sup> Whence came this sufficient body of law? "There is some reason to suspect that the judges of the Thirteenth century drew, in secret, freely, though not always wisely, from current compendia of the Roman and Canon laws."<sup>6</sup>

However this may be, our legal system grew generation after generation, expanding to meet the requirements of the people, and perhaps, as time passed on, not fully conscious of the amount of its indebtedness to that Roman jurisprudence to which it always denied authority. Hatred of foreign domination and of foreign manners and customs made the English people doggedly refuse to accept a system of jurisprudence, however refined and however far in advance of their own comparatively rude legal conceptions, because it was introduced to them by the foreign ecclesiastics whom they distrusted and despised.

But the work in private law of the great juriconsults of Rome in the discovery of the principles that lay back of the law

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<sup>4</sup> "Ancient Law," p. 30.

<sup>5</sup> "Ancient Law," p. 31.

<sup>6</sup> "Ancient Law," p. 31.

governing the mutual dealings of men, was of so universal and permanent a character that these principles necessarily found their way, secretly perhaps but not less surely, into the English law. Speaking of the work accomplished by the Roman jurists in this direction, Sohm says, "The problem here (*i. e.*, in working out the principles of a free and equitable law for the mutual dealings of men, such as the legal effect of conditions, the contractual liability for negligence, etc.) was to discover the true nature of the dealings themselves, to trace the *unexpressed and unconscious intention* underlying all such dealings, and, having done so, to put it into words, to clothe it in a form in which definiteness and lucidity should be coupled with a degree of comprehensiveness sufficient to bring out the broad general principle governing, not merely a large number of cases, but positively *all* cases, including those which were peculiar and exceptional. Such a problem touched rather the creation than the application of law. \* \* \* The genius of Roman jurisprudence \* \* \* gave little thought to the abstract conception of law of ownership, or of liability, \* \* \* but with regard to the consequences involved in the abstract conception of ownership or of liability, its natural instinct was never at fault for a single moment. And nowhere was this unique power more conspicuously displayed than in the way the Roman jurists, so to speak, hit upon the precise requirements of *bona fides* in human dealings, and applied them to individual cases."<sup>7</sup> Primitive Roman law, like that of all other legal systems in their early stage, consisted of outward and ceremonious formalities, the exact observance of which was the only requisite to the validity of the transaction. The intention, the will, the agreement of the minds which really lay back of the transaction and formed the real reason or cause of it, were totally disregarded. From this dry skeleton of formalism the Roman jurists slowly, and with cautious steps, evolved the truth, *i. e.*, that the formalities were nothing, the intention was everything. Let me illustrate this by a short account of the most important of the services rendered by the Romans to the jurisprudence of all nations and times, the evolution of the contract, as described by Maine in the ninth chapter of his "Ancient Law." A contract, as understood by the Romans, was a convention plus an obligation, the latter being the element which made the transaction binding. Now contracts were classified as follows: The Verbal, the Literal, the Real, and the Consensual.

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<sup>7</sup> "Institutes of Roman Law," pp. 72, 73.

In the Verbal Contract, the oldest of all, when the convention was reached it was necessary to clothe it in a certain "technical phraseology, specially appropriated to the particular occasion." In this contract the stipulation or solemn form of words alone constituted and created the legal obligation. Next, in the Literal Contract, the "formal act by which an obligation was superinduced on the convention, was an entry of the sum due, where it could be specifically ascertained, on the debit side of a ledger." There is some obscurity as to the exact manner in which this contract was created, but it turns on "a point of Roman domestic manners, the systematic character and exceeding regularity of book-keeping in ancient times." But the point to be observed is that in this contract when the entry was made all formalities were dispensed with, and the contract was complete. "This is another step downwards in the history of contract law."

We now come to the Real Contract, which again shows "a great advance in ethical conceptions." When the convention had been for the delivery of a specific thing, the simple delivery of the thing gave rise to the obligation without further formality. In other words, "performance on one side is allowed to impose a legal duty on the other, evidently on ethical grounds. For the first time then, moral considerations appear as an ingredient in contract law."

Lastly, we have the Consensual Contract, in which the "Consensus or mutual assent of the parties is the final and crowning ingredient in the convention, \* \* \* and as soon as the assent of the parties has supplied this ingredient there is *at once* a contract." Thus in this contract the mutual assent has the same effect in causing the obligation to attach to the convention, as has the form of words, the written entry, and the performance on one side in the Verbal, Literal, and Real contracts, respectively.

The Consensual Contracts were limited, being only four in number, viz., Agency, Partnership, Sale, and Letting and Hiring. "But it cannot be doubted that they constituted the stage in the history of contract law from which all modern conceptions of contract took their start. The motion of the will which constitutes agreement was now completely insulated, and became the subject of separate contemplation; forms were entirely eliminated from the notion of contract, and external acts were only regarded as symbols of the internal act of volition." In this connection Sohm observes, "The department of law where

the peculiar genius of the Roman jurists found full scope is the law of obligations, the law of debtor and creditor, the law, in other words, which is most properly concerned with the mutual dealings between man and man; and here again it is more especially the law relating to those contracts where not merely the expressed, but also the unexpressed intention of the parties has to be taken into account. And in regard to this unexpressed intention which is not, for the greater part, present to the mind of the party himself at the moment of concluding the contract, it was the Roman jurists who discovered it, and discovered it for all time to come, and enunciated the laws which result from its existence. This is a task which will never have to be done over again. And at the same time, they clothed these laws in a form which will remain a model for all future ages."<sup>8</sup> It cannot be doubted, and it is now, indeed, generally acknowledged, that the English law, in its early formative period, owed much to Roman law.

Professor James Hadley, after alluding to the "feeling less favourable than mere indifference, a tinge of jealousy or repugnance" with which many practitioners and professors of the common law have regarded the civil law, shows that the influence of the civil law on the theory and practice of law in English has been felt in many ways and to a very great extent. Thus, through the ecclesiastical courts much of the procedure and principles of the civil law with regard to wills, intestacy and administration, passed into the English system. Through the Court of Chancery, presided over as it was for a long period by an ecclesiastic, the doctrines and methods of the civil law regarding equitable jurisdiction, became a part of the system of English equity. And, lastly, Professor Hadley shows that in commercial and maritime law the English law is largely indebted to the civil law, the reason being that early English private law was almost exclusively a law of real estate, personal property receiving scarcely any attention. Therefore when trade and business relations developed and became more complicated, it became necessary for English judges to find principles to meet the new demands. "In the civil law they found ready to their hand a store of such principles, carefully worked out and copiously illustrated. \* \* \* It is not surprising that the English judges should have adopted them in their decisions, and so incorporated them into the English law."<sup>9</sup> The steadily growing

<sup>8</sup> "Institutes of Roman Law," p. 74.

<sup>9</sup> Hadley's "Introduction to Roman Law," pp. 43-48.

opinion that law is a science and should be studied as such has necessarily done much to remove that "ignorance of Roman law which Englishmen (and I may add Americans) readily confess, and of which they are sometimes not ashamed to boast." <sup>10</sup>

The exclusion from our course of study of a system to which we are so much indebted seems to be explicable only on the ground that we have not entirely passed, in our process of evolution, from the old ideas to the new. A law school, like an army, consists, after all, of its rank and file—that is, of its students—and law schools must provide those courses which find most favor with those who are to attend them.

"Institutions," says Professor E. J. Phelps, in an article on Legal Education in this journal,<sup>11</sup> "must meet the demands of their times, right or wrong, or they will soon cease to be institutions, for the lack of disciples." And I think that the majority of law students would consider, like their English confreres as described by Markby earlier in this article, that "forensic skill, skill in the art of drawing up legal documents, and skillfulness in the advice given to clients" are all that can, or ought to be, learned in a law school course. But still I hope that the time is coming when those who enter our law schools will do so with the intention of *studying* law rather than of *learning* it, of understanding its principles as well as of becoming proficient in its practice. The immense development of law in the United States and the enormous mass of reported decisions issued yearly from its numerous courts, tend, as it seems to me, to render it more necessary for the student to spend much of his period of legal study in becoming acquainted with the principles upon which this ever-growing mass of law is based. To attempt adequately to cover the entire field of practical law in a two or even a three-year's course, seems to be impossible, and it may be, perhaps, in declining to attempt it, that the University Law School may take its next step in advance. The vast and rapid growth of the law tends to the growth of specialties in its various branches, and perhaps it may be the function of the Law School of the not distant future to devote the larger part of its course to a thorough grounding in the principles of law and the cultivation of habits of correct reasoning, the remainder of the course being given to the special branch of law which the student expects to practice. To cite Professor E. J. Phelps again, "The very first and indispensable requisite in

<sup>10</sup> "Ancient Law," p. 347.

<sup>11</sup> YALE LAW JOURNAL, Vol. I., No. 4, p. 143 (March, 1892).

legal education, without which there can be none that is worthy of the name, is the acquisition of a clear and accurate perception, a complete knowledge, a strong, tenacious grasp of those unchangeable principles of the common law which underlie and permeate its whole structure, and which control all its details, its consequences, its application to human affairs. That should be the work of the law school, to the student who is happy enough to enjoy its privileges. If it does that for him, it does quite enough, and all there is time for." <sup>12</sup>

And Markby expresses the same view of the function of the University Law School when he says, "But it is only with the earliest, and what I may call the preliminary portion of a lawyer's education that a University has to deal. \* \* \* The only preparation and grounding which a University is either able, or, I suppose, would be desirous to give, is in law considered as a science; or, at least, if that is not yet possible, in law considered as a collection of principles capable of being systematically arranged, and resting, not on bare authority, but on sound logical deduction." <sup>13</sup>

Much has undoubtedly been done already in our law schools in the direction of teaching of the kind just mentioned, but much more remains yet to be accomplished. Judge Dillon in his Storrs' lectures in 1891 expresses the opinion that the actual course of instruction in our law schools is too intensely practical and technical, and that the course can have and should have a broader scope than it has when the student is confined to the usual text-books written for practicing lawyers, and the designated illustrative cases, since the oral instruction rarely goes beyond this range. He then continues, "To supply this want the civil law, for purposes of comparative jurisprudence and because of its more orderly and scientific arrangements, should, in its great outlines and essential character, be made an element of instruction to a greater extent than it is in our American law schools. Except in this view and in this incidental or subordinate way, I doubt its utility in the short course of legal study to which our law colleges are confined. I have long been of opinion that less than a three-years' course of study ought not to be adopted." <sup>14</sup>

Is not Judge Dillon's criticism a true one? Are we not somewhat in danger, in our anxiety to fit our student for imme-

<sup>12</sup> YALE LAW JOURNAL, Vol. I., No. 4, p. 140.

<sup>13</sup> "Elements of Law," p. xi.

<sup>14</sup> "Lectures on Law and Jurisprudence," p. 86.

diate practice, of losing sight of the importance of a thorough grounding in the principles of the science they expect to apply? Professor Phelps says, in the article cited above, "I would confine, therefore, the business of the law school, were it left to me, chiefly to the groundwork of the law. This I would try to have taught with extreme thoroughness. And I would regard mental discipline, habits of thought and the learning how to think clearly, accurately, and with the confidence that can only come from the consciousness of a sure foundation, as far more important than the premature accumulation of much knowledge."<sup>15</sup> It seems to me that where the period of study is extended from two to three years, more systematic instruction should be given in the science of law. Every student ought to participate in it, and it should no longer be considered an agreeable but by no means necessary part of a student's legal education, a kind of interesting inquiry to be pursued in a leisurely manner by the few whose pocket-books or predilections suggest a post-graduate course as a pleasant addendum to the necessary period of study. And in the study of law as a science the Roman law must, in its "broad outlines and essential character," take a prominent place. Surely, the time has come when we may rise above the prejudices and objections handed down to us from the past, and no longer refuse to avail ourselves of the treasures of legal knowledge to be obtained from the *corpus juris*. Let us not forget that this body of law is the acknowledged foundation of every system of jurisprudence in use in the civilized world, except our own, and that, even in our own, there is much that has been taken, though not acknowledged, from this source. Roman law is no archaic effete system, the mouldy rubbish of a society and a civilization long since worn out, but "the most celebrated system of jurisprudence known to the world," and one which has profoundly influenced not only the legal but the moral and religious ideas of the world in all ages. Moreover, in its bearing on international law, it has furnished the common ground on which nations can equitably adjust their differences.

In its ethical aspect Roman law is the source from which ideas of the profoundest importance to the political and social development of the world have arisen. Both in its legal and ethical aspects its study is of great practical importance to the American lawyer of the future.

The constant flow of immigration into the United States

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<sup>15</sup> YALE LAW JOURNAL," Vol. I., No. 4, pp. 142, 143.



brings large numbers of citizens of foreign countries whose legal systems are founded on the Roman law. The greater facilities of intercourse enable these strangers to maintain, as they could not in earlier times, their family connections in their native lands. From this intercourse will doubtless arise many matters requiring professional advice, and in giving such advice the American lawyer with some knowledge of Roman law will be in a sounder and more advantageous position.

In its wider aspect, by which I mean its influence on political and social ideas, it will be of even greater value to him in the time to come. For lawyers, unless they fall behind in the general advance in education, must exercise very great influence on the course of national affairs. And it is becoming more and more important, in view of the growing preponderance in public affairs of those who are the possessors of that little knowledge which is proverbially so dangerous, that there should be a body of men in the country acquainted with the origin of many of the prominent ideas of the times, and thereby able to sift the grain of good from the chaff of passion or prejudice, and competent to interpose a barrier of calm, deliberate conviction against the winds of ignorant or emotional theories. It would take me too far into the subject to set forth in detail how the study of Roman law and of works for the full comprehension of which some knowledge of Roman law is necessary not only extends but steadies the mental vision in legal political and social matters. It should not be necessary to urge this at all, but were the influence of Roman law known there would be no need to urge its study. With the existing excellent organization of American law schools I think that the opportunity for vastly improving our system of legal education and of removing from ourselves a matter of reproach, is very favorable. But some change must come over our ideas on the subject of law school training before this opportunity can be taken advantage of. As long as Roman law is a required study only for the comparatively few who take Master's or Doctor's degrees, the reputation of the school does not suffer much. But I fear that according to our present ideas if Roman law were made a required subject in the undergraduate course the deadly epithet "impractical" would fall on the school, and wither it away. And yet, as it seems to me, there is now the fairest opportunity for the United States to obtain the honor of being the first of the English-speaking nations to teach its law in a manner worthy its importance. In England, as I have shown above, the influence of the

past has hitherto been too powerful to permit any real change in the methods of legal education. But even there the necessity for improvement is recognized, and it is probable that some measures must soon be taken to remedy the existing condition. But before any real improvement can be effected it will be incumbent upon the reformers to organize a law school or law schools in which proper instruction can be given.

In this country the organization is in full force; all that is wanted is to give effect to the process of evolution that has been going on in legal education since the Declaration of Independence. When the United States proclaimed their independence they adopted so much of the common law of England as was consistent with their altered circumstances. They probably adopted also, for the time at least, the English ideas and system of legal education. But the establishment of regular law schools marked a distinct advance on those old ideas, although the past has been sufficiently powerful to impart to the new system some of the prejudices and imperfections of the old. I think, however, that in the not-distant future the legal education provided by our universities will reach its full logical development in offering to students not merely an opportunity to make themselves good legal workmen, but good sound lawyers as well. No institution can continue to exist with benefit to the community without obeying its inherent natural law of development and advancement. I venture to suggest that when law schools were first instituted their founders, however convinced of their utility, hardly foresaw the possibilities opened up by them. So strong are old prejudices that the law school seems at first to have entered into a kind of timid competition with the office of the practicing lawyer, and to have found it sometimes necessary to offer something that was almost an apology for its existence beside the older system. But the times were with it and it prospered, keeping, however, "the office" in mind, its courses of instruction bearing traces of this solicitude.

I do not think I am wrong in regarding the establishment of post-graduate courses as one of the most important steps in the advance of the law school in usefulness and independence. It showed thereby that it recognized the high character and far-reaching importance of the work to which it had set its hand. It indicated thereby that the function of the law school was not complete when it had afforded such instruction as the office might offer, though perhaps more systematically and conveniently arranged. The sources of law, its origin, nature, extent, limi-

tations, and a comparison of different systems of law now came to be recognized as matters important for the student's attention. Here the advance seems to have been arrested for the time, more in appearance, perhaps, than in reality.

The next step will be, I hope and believe, to require every student to take, in his undergraduate course, some at least of the studies now reserved for the post-graduate years. Included in these studies should be Roman law "in," (to repeat Judge Dillon's words) "its great outlines and essential character," and "because of its more orderly and scientific arrangement." The benefit to the student of a course in Roman law as a mere legal study consists in opening out to him the source of many of the legal conceptions he is meeting with in American law, and in spreading before him, in clear, striking manner, the principles upon which these legal conceptions are based.

I know that there is a very strong prejudice against the study of Roman law, but I think that the more it is studied the weaker will the prejudice become. For I feel sure that every American lawyer who has honestly studied Roman law will acknowledge that his acquaintance with it renders him more capable of dealing with the problems and difficulties presented by the jurisprudence of his own country.

*W. F. Foster.*

NEW YORK CITY, February 1, 1898.

BILLS OF LADING GIVEN FOR GOODS NOT IN  
FACT SHIPPED.

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MUNSON PRIZE THESIS.

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## II.

Several of the States have followed the decisions of the English and United States courts which we have already discussed. Louisiana,<sup>58</sup> in 1858, adopted the doctrine that the master of a vessel could not bind the owners by signing a bill of lading for goods not actually delivered on board. In *Fellows v. steamer Powell*<sup>59</sup> (1861) Judge Laud held that the master, in signing bills of lading for goods not received, acted outside of his authority and failed to bind the owner. In 1877 the case of *Hunt v. Miss. Cent. R. R.*<sup>60</sup> was decided. Judge Marr gave the decision of the court in a very strong opinion. He said that the consignee ordinarily could not verify the signature of the agent or determine the genuineness of the bill of lading, hence that he must and does rely almost entirely on the honesty of his correspondent—the shipper—who has perfect information concerning the genuineness of the bill of lading. If this is misplaced confidence the railroad is not liable. He held that the station agent had no authority to issue false bills of lading and that the statute which made them negotiable in that State applied only to genuine bills. The Legislature has no more power to bind a carrier on a false bill of lading or one signed by a person not authorized, than it has to make a person liable on a promissory note or bill of exchange signed in his name by one not authorized to bind him. The agent would be liable but not the carrier. Judge Egan and DeBlanc dissented from this opinion of Judge Marr on the following grounds: (1) That as the law is unsettled in this country it should be made to conform to the custom of trade ; (2) that the spirit of the statute was such as would hold the carrier liable ; and (3) that the agent was acting in the usual course of his employment and should therefore bind the carrier. Massachusetts has the earliest case on this sub-

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<sup>58</sup> *Fearn v. Richardson*, 12 La. Ann.

<sup>59</sup> 16 La. Ann. 316.

<sup>60</sup> 29 La. Ann. 446.

ject—*Walter v. Brewer*<sup>61</sup> (1814). In this case it was held that the owners of a vessel might contradict a false bill of lading issued by the master, although it was in the hands of an innocent purchaser, because the master in signing the bill had acted beyond his authority. In 1861 Judge Hoar, in deciding the great case of *Sears v. Wingate*,<sup>62</sup> said, "When the master is acting within the limits of his authority, the owners are estopped in like manner with him; *but it is not within the general scope of his authority to sign bills of lading for any goods not actually on board.*" Ohio has followed this rule. *Dean v. King*<sup>63</sup> (1871), was a suit by the consignee of a bill of lading against the owner of the vessel whose master had issued it. It was held competent to show by parol that the goods in controversy had not been received by the master: (1) Because the bill of lading was a receipt; and (2) because the master had no authority to issue it until the goods were on board. Missouri, in *La. Nat. Bk. v. Lavielle*<sup>64</sup> (1873) held that a bank which had paid a bill of exchange on faith of the attached bill of lading, could not recover from the owners of a vessel for non-delivery of the goods mentioned in the bill of lading, when said goods had never been received by the master who signed the bill of lading. Maryland, in *B. and O. R. R. v. Wilkens*<sup>65</sup> (1875) held that a *bona fide* holder for value of a false bill of lading could not recover against the railroad whose agent had signed the bill. But in 1876 the Legislature passed a very broad statute on this subject which will probably change the course of decisions in that State.<sup>66</sup> North Carolina, in *Williams v. W. R. R.*<sup>67</sup> (1885) has followed the doctrine of the United States courts and has decided that the agent of a railroad has no authority to sign a bill of lading for more goods than are shipped. Indiana, in *Louisville, etc., R. R. v. Wilson*<sup>68</sup> (1889), adopted the same view and allowed a bill of lading to be contradicted so far as it was a receipt.<sup>69</sup> Minnesota is in the same line. *McCord v. W. U. Tel. Co.*,<sup>70</sup> applied the *estoppel* doctrine, but was overruled by Nat.

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<sup>61</sup> 11 Mass. 100.

<sup>62</sup> 3 Allen 103.

<sup>63</sup> 22 O. St. 118.

<sup>64</sup> 52 Mo. 380.

<sup>65</sup> 44 Md. 11.

<sup>66</sup> See *Tiedeman v. Knox*, 53 Md. 612.

<sup>67</sup> 93 N. C. 42.

<sup>68</sup> 119 Ind. 350.

<sup>69</sup> See also *Union R. R. and Trans. Co. v. Yeager*, 34 Ind. 1.

<sup>70</sup> 39 Minn. 181.

Bank v. C. B. and W. R. R.<sup>71</sup> (1890) which adopted the United States rule. Judge Mitchell regarded the arguments for estoppel as very strong, but thought the question settled and that the States should follow the United States rule for the sake of uniformity. He also held that the statute,<sup>72</sup> making bills of lading negotiable did not affect the question.

(3) Let us now examine the cases which hold that carriers, as against *bona fide* holders for value, are estopped to deny the truth of the statements made by their agents in the ordinary bill of lading.

While the English authorities already discussed settle the law in that country, yet there has been some conflict even there. In *Howard v. Tucker*<sup>73</sup> (1831) it was held that the owners of a vessel *were estopped* by a bill of lading which stated that freight had been paid, from asking freight of an assignee of the bill, although the freight had never been paid. *Berkley v. Watling*<sup>74</sup> (1837) seems to favor the *bona fide* holder. Judge Patterson said, "This decision will not affect any question which may arise hereafter as to the conclusiveness of a bill of lading between the ship-owner and an indorsee for value. I should be sorry to destroy the negotiability of the instrument." Chief-Justice Holt was of the opinion,<sup>75</sup> "That the merchant was answerable for the deceit of his factor; for seeing somebody must be a loser by the deceit, it is more reasonable that *he that employs and puts trust and confidence in the deceiver should be a loser, than that a stranger should be.*" As late as 1883, we have a strong English case which holds that the doctrine of estoppel is applicable to a very similar instrument—*C. S. & Co. v. Gr. E. R. R.*<sup>76</sup> In this case the agent of the railroad issued two original "delivery orders" for the same consignment of goods. C. S. & Co. made advances on both orders in good faith. It was held that the railroad *was liable* on both. The court said, "The documents have a certain mercantile meaning attached to them and therefore the defendants owed a duty to the merchants and persons likely to deal with these documents." It does not seem possible to reconcile this case with *Grant v. Norway* and *Hubbersty v. Ward*. However, this is not sufficient to throw the English doctrine into doubt, and *Grant v. Norway* must still be considered authority.

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<sup>71</sup> 44 Minn. 224.

<sup>72</sup> (1878) Ch. 124 § 17.

<sup>73</sup> 1 Bar. & Ad. 712.

<sup>74</sup> 7 Ad. & El. 29.

<sup>75</sup> In 1 Salk. 289.

<sup>76</sup> L. R. 11 Q. B. D. 776.

Several of our State courts have adopted the estoppel theory and hold that the carrier is liable to a *bona fide* holder for value on a false bill of lading issued by its agent. They, like the other courts rest their decisions chiefly on the doctrine of agency, and hold that the agent whose duty it is to issue bills of lading acts within the *apparent* scope of his employment even when he issues a bill of lading for goods not in fact shipped, and hence that the carrier is bound. New York has taken the lead in holding this view. In 1851—the very year of *Grant v. Norway*, and four years earlier than schooner *Freeman v. Buckingham*—Judge Edmonds, in *Dickerson v. Seelye*,<sup>77</sup> said, “As between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may *not* be explained.”<sup>78</sup> In such case the superior equity is with the *bona fide* assignee who has parted with his money on the strength of the bill of lading.” *Armour v. Mich. Cent. R. R.*<sup>79</sup> (1875) was a case where the agent was induced by forged warehouse receipts to issue bills of lading. The agent was told that they were to be used to secure advances. They came into the hands of a *bona fide* holder for value. Chancellor Gray said, “The well recognized principle that a party who, by his admissions has induced a third party to act in a particular manner, is not permitted to deny the truth of his admissions, if the consequences would be to work injury to such third party, applies to and governs this case.” Chancellor Dwight, in the same case, said that *Grant v. Norway* had been severely criticised and that New York had decided against it. He held that the railroad had put confidence in the agent and had clothed him with the apparent authority to issue these false bills. He said, “The bills of lading were issued with the expectation that they would be acted upon by bankers and other capitalists; the defendants cannot complain if they have accomplished the purpose for which they were designed. The representations in the bills were made to any one who may think fit to make advances on the faith of them. There is present every element necessary to constitute a case of estoppel *in pais*—a representation made with knowledge that it might be acted upon and subsequent action on faith of it to such an extent that it would injure the plaintiff if the representations were not true.” The same doctrine was applied, in *Griswold v.*

<sup>77</sup> 12 Barb. 99.

<sup>78</sup> See, also, *Portland Bk. v. Stubbe*, 6 Mass. 422; *Abbott on Ship*, 323-4; and *Bradstreet v. Lees*, M. S. U. S. Dist. Court.

<sup>79</sup> 65 N. Y. 111.

Haven,<sup>80</sup> to a receipt. In *Farmers' and Mechanics' Bank v. Erie R. R.*<sup>81</sup> (1878) the bank had a lien on some wheat owned by W. W. agreed to sell the wheat to N. and gave him an order on the warehouse to deliver it to the railroad subject to his (W.'s) orders. The railroad agent gave N. a bill of lading without any evidence of N.'s right to the property. The bank made advances on this bill. It was held that the bank could recover from the railroad for the wrongful and negligent act of its agent. The *Bank of Batavia v. N. Y., L. E. and W. R. R.*<sup>82</sup> (1887) has settled the law in New York. This was a case where the alleged consignor and the agent of the railroad entered into a conspiracy to defraud any one who might rely on their false bills of lading. The bank was defrauded and sued the railroad. The court said, "It is a settled doctrine of the law of agency in this State, that where the principal *has clothed the agent with power to do an act upon the existence of some extrinsic facts necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is of itself a representation*, a third person dealing with such agent in entire good faith, pursuant to the *apparent* power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." It was further said that the railroad knew the character and uses of their bills of lading and expected the banks to rely upon them. The bank knew nothing of the agent's lack of authority to issue these particular bills and had no way to find out except from the agent himself, and he had already indicated his authority by his signature. The bank was compelled to rely upon the agent and the railroad must be estopped from denying the bills of lading. Connecticut seems to have adopted this view. The leading case in this State on the power of agents to bind their principals, is *Bridgeport Bank v. N. Y. & N. H. R. R.*<sup>83</sup> (1861). In this case the transfer agent of the railroad issued fraudulent certificates of stocks far in excess of the capital stock. He and his partner owned one hundred and sixty genuine shares. They deposited certificates for ninety shares with the bank as collateral. They afterwards transferred their genuine shares to other parties. Held that the ninety shares are presumed to be a part of the one hundred and sixty genuine shares. The fact that the genuine shares had been transferred, made no difference. This was a

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<sup>80</sup> 25 N. Y. 595.

<sup>81</sup> 72 N. Y. 188.

<sup>82</sup> 106 N. Y. 195.

<sup>83</sup> 30 Conn. 231.



fraud on the bank and the *railroad company was held liable for the agent's act*. Certificates of stock signed in blank have a kind of negotiability and are similar to bills of lading. In *Relyea v. New Haven R. M. Co.*<sup>64</sup> (1875), Judge Shipman held that the consignee who had paid for the full amount of goods mentioned in the bill of lading could recoup in an action for freight to the value of the goods not delivered. In this case the captain of the vessel had signed the bill of lading for six tons of iron more than were shipped. It was thought that, as the instrument was *quasi* negotiable, the master (who was also the owner) owed a duty to innocent purchasers and if they were deceived by *his agent*, a legal liability was imposed. Kansas has already adopted the estoppel theory. In *Wichita Savings Bank v. A. T. and St. Fe R. R.*<sup>65</sup> (1878), the agent of the railroad issued two bills of lading for the same consignment of wheat, and the bank made advances on one of them. The shipper having become insolvent, the bank sued the railroad. Chief-Justice Horton, in a very elaborate opinion, showed that the bulk of trade in grain and produce was done by bills of lading. Dealers were accustomed to buy grain, have it delivered, secure bills of lading, attach drafts, secure advances, and, in this way, carry on an extensive cash business with but a small capital. This is not only an advantage to the dealer, but it also gives the producers a better market, enables the banks to get fair interest on the security of the bills of lading, and furnishes additional business for the railroad by facilitating and increasing shipment. A mode of business so beneficial to so many classes ought to receive the favoring recognition of the law. "In accordance with well-settled rules the plaintiff, \* \* \* having made advances on the faith of the bills of lading, issued by the agent of the company *within the apparent scope of his authority*, was entitled to recover of such defendant all damages resulting to him from the issuance of two original bills of lading, \* \* \* and the defendant was *bound by the act of its agent*, and therefore estopped from denying that it had the grain mentioned in the bill of lading sued on. When the defendant knew to what uses bills of lading could be and usually were employed, it was guilty of negligence in issuing two original bills for the same wheat." The bank was not guilty of negligence and, hence, had the superior equity on the doctrine that "whenever one of two innocent parties must suffer by the act of a third, he who has enabled

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<sup>64</sup> 42 Conn. 579.

<sup>65</sup> 20 Kan. 519.

such third person to occasion the loss must sustain it." The decision was not dependent upon the negotiability of the instrument. Bills of lading were not considered fully negotiable independent of statute, "but in the absence of legislation the defendant ought not to have authority to issue bills of lading for grain, and thus put it into the power of the holder thereof to trade with the public on the representations made in them, and then \* \* \* contradict the representations of the paper and thereby injure the persons who have been misled. The principle of estoppel does and ought in such cases to apply." Nebraska has adopted the same view. In *Sioux City, etc., R. R. v. First Nat. Bk.*<sup>86</sup> (1880), the agent of the railroad had issued bills of lading for five cars of wheat when only about one-half of a car had been shipped. The bank discounted a draft on faith of the bills, and finding that the consignor had absconded, sued the railroad. After a review of the authorities the court held that all the elements of estoppel were present and that the railroad was liable. It was said that the principle of estoppel had been entirely overlooked in *Grant v. Norway* and the cases following it. Pennsylvania, in *Brooke v. N. Y., L. E. and W. R. R.*<sup>87</sup> (1885), has followed the New York rule. Brooke was consignee of grain and had advanced on bills of lading which called for more than was shipped. The contract was made in New York and the law of that State would govern, but the Pennsylvania court agreed with the New York decisions. Judge Sterrett held that Brooke's claim was both reasonable and just. He quoted *C. S. & Co. v. Gr. E. R. R.*<sup>88</sup> (already discussed) with approval and said that the true limit of an agent's authority as between the principal and third parties is the *apparent authority with which he is invested*, but as between the principal and the agent it is the *express* authority.<sup>89</sup> Hence the principal is bound by the acts of his agent which are within the scope of the authority which he is held out to the world to possess, notwithstanding the agent acted contrary to instructions.<sup>90</sup> The authority of the agent is implied from the performance of similar acts with the consent of the principal.<sup>91</sup> When one of two innocent parties must suffer from the acts of an agent, the one who has held out the agent as

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<sup>86</sup> 10 Neb. 556.

<sup>87</sup> 108 Pa. St. 529.

<sup>88</sup> L. R. 11 Q. B. D. 776.

<sup>89</sup> Evan's Agency 594, 606.

<sup>90</sup> Whart. Cont., §§ 96, 130, 269.

<sup>91</sup> Evan's Agency 193, note.

worthy of trust should suffer.<sup>92</sup> It was held that public policy and the good of the corporations themselves demanded the application of these rules. "Under the circumstances the defendant is estopped from denying what its accredited shipping agent asserted in the bills of lading, by which the plaintiffs without any fault on their part were misled to their injury. It is contended that inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods, had been given by the railroad to Wiess (the agent), it was not responsible for his unauthorized acts, even to innocent third parties who were misled and injured thereby. We cannot assent to this proposition. It is conceded that the company did not authorize the issuance of bills of lading without receipt of the goods, *but it put Wiess in its place to do that class of acts*, and it should be responsible for the manner in which he conducts himself within the range of his agency." Illinois also holds this doctrine. In *St. L. and I. M. R. R. v. Larned*<sup>93</sup> (1882) the agent of the railroad by mistake sent goods to the wrong place. On learning of his mistake he issued a bill of lading in which he agreed to re-ship the goods to their proper destination. The goods had already been delivered at the other place to another party. Larned, who was consignee of the goods, and who had made advances on the last bill of lading, was allowed to recover from the railroad. The court held that it would be fraud to permit the railroad to escape liability by showing that the statements in the bill of lading were not true. It was held to be, in the fullest sense, an estoppel on the railroad. In the case of *Tibbits v. R. I. and P. R. R.*<sup>94</sup> (1893) the consignee of wheat who had paid for the full amount mentioned in the bill of lading was allowed to recover from the railroad for a failure to deliver that amount, although it was shown that the railroad had delivered all it received. Judge Cartwright held that bills of lading were of material aid to traffic and business and were constantly used in securing advances. That the railroad was bound to know this and was liable to one who had in good faith made such advances. Alabama, under the statute of 1881, has adopted this doctrine. In *Jasper Trust Co. v. K. C. M. and B. R. R.*<sup>95</sup> (1892) the agent of the railroad not only issued false bills of lading but also issued them to a *fictional* firm. They came into the hands of the trust

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<sup>92</sup> *Evan's Agency* 591.

<sup>93</sup> 103 Ill. 293.

<sup>94</sup> 49 Ill. Ap. 567.

<sup>95</sup> 99 Ala 416.

company, for value. Chief-Justice Stone held that before the passage of the statute in 1881, the trust company would have had no remedy against the railroad. The statute as incorporated in the code of 1886 (sec. 1179) is as follows: "If any common carrier, not having received things or property for carriage, shall give or issue a bill of lading, or receipt, as if such things or property had been received, \* \* \* such carrier \* \* \* is liable to any person injured thereby for all damages, immediate or consequential therefrom resulting." Under this statute the railroad was estopped as against the trust company.

From the cases discussed above it is evident that there is a plain conflict of authority in this country. The arguments have been given so fully in connection with the cases that it is not necessary to re-state them here. However, it seems that the question on which the courts are divided is the question of agency. We believe all the courts agree that so long as the agent is *acting within the scope of his authority* the principal is bound. Even in the case of *Pollard v. Vinton*<sup>96</sup> it is said, "A corporation cannot be charged with any intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents and are to be treated as agents of the corporation, or corporators, it is also true that for some purposes they are the corporation, and *their acts as such officers are its acts.*" There is no question but that if the agent had authority from the corporation to issue a false bill of lading, the representations contained in it would be binding on the corporation and it would be estopped to deny them as against innocent purchasers. The question is, does the agent of a common carrier, when he signs a bill of lading for goods not in fact shipped, act within the scope of his authority? If he does, the act is the act of the carrier, and the carrier will be liable for the reasonable consequences of that act. If he does not, the carrier is not liable. One class of decisions holds that he does *not* act within the scope of his authority, while the other holds that he does. The first class arrives at the conclusion that so far as the carrier is concerned the false bills of lading are absolutely void, while the second class concludes that they are the representations of the carrier which estop it from denying them to the injury of those who have in good faith relied upon them.

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<sup>96</sup> 105 U. S. 7.

We are forced to admit that the great weight of authority is *against* considering the acts of the agent, in issuing a false bill of lading, as *within the scope of his authority*, so as to work an estoppel against the carrier; but we are of the opinion that, when we consider the legal character of the instrument itself, its uses and importance in commercial transactions, the demands of modern business methods, and the usual principles of the law of agency, the arguments of those who favor the doctrine of estoppel are more nearly in accord with custom, reason and justice, than are the arguments of those who oppose it.

It is not contended that the carrier gives the agent authority to issue bills of lading for goods not in fact shipped. But it must be acknowledged that the carrier *does* give him authority to sign bills of lading under certain circumstances which are peculiarly within the agent's knowledge and about which the public knows and can know nothing. The very issuance of the bill in due form is an assertion by the agent that he is acting within his authority and that the proper circumstances do exist. If the carrier holds out its agent as worthy of confidence, gives him the power to make out a *prima facie* case, puts him into a position to make representations in the name of the carrier upon which a purchaser has a right to rely and does rely, the carrier and not the innocent purchaser ought to suffer.

Modern business methods and the character and uses of the instrument demand this view. In *McNeil v. Hill*<sup>97</sup> (1865) where a false warehouse receipt came into the hands of an innocent purchaser, Mr. Justice Miller said, "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter, and otherwise, which prevailed while society was in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent invention, of a like character, for the transfer without the somewhat cumbersome and often impossible operation of actual delivery of the articles of personal property, is the indorsement and assignment of *bills of lading* and warehouse receipts. Instruments of this kind are *sui generis*. From long usage in trade they have come to have among commercial men a well-understood meaning and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named, as would a bill of sale. \* \* \* If the warehouseman gives to a party who holds such a receipt a false credit, he will,

<sup>97</sup> Woolworth's R. 96.

not be suffered to contradict his statements which he has made in the receipt so as to injure a party who has been misled by it. That is within the most exact definition of estoppel." It seems to us that present developments and circumstances demand that this principle be carried one step further and applied to the carrier whose agent has issued a false receipt. Such a step would give the fullest confidence to this class of securities which is so important. It would make carriers responsible for the honesty of their agents and would not require of the merchants and banks, who deal with these instruments, the often impossible and always difficult task of ascertaining whether the goods have actually been shipped.

This view finds a strong support in the rule which holds a bank bound by the act of its proper officer in certifying a check, although the bank has no funds with which to pay it. Certifying a check when there are no funds in the bank with which to pay it seems quite as much beyond the authority of the cashier or teller as issuing a false bill of lading is beyond the authority of the freight agent. Yet no court has decided that a check so certified is not binding upon the bank, where third parties have acquired interests in ignorance of the true facts. The question of negotiability does not enter into the case. It is purely a question of agency and estoppel.<sup>98</sup> On this question the Supreme Court of Pennsylvania, in the recent case of *Hill v. Nat. Trust Co.*<sup>99</sup> has said, "If his (the cashier's) authority as between himself and his principal was in fact restricted to cases in which the drawer had sufficient funds, and he either intentionally or by mistake, transcended the authority by making the check good when the drawer thereof had no funds, the consequences of his blunder should be visited, *not upon the innocent holder of the check, but upon the agent's employers who put it in his power to commit the wrong.*" It seems to us that this same doctrine should be applied to carriers whose agents have issued bills of lading for goods not in fact shipped.

This view finds support also in the rule applied to the issuance of certificates of stock in a corporation which are said to be paid up when in fact they are not paid up. Mr. Morawetz<sup>100</sup> says, "It is well settled, if certificates for paid-up shares, issued by the regular agents of the company in the ordinary form, have been transferred to an innocent purchaser, the *company will be*

<sup>98</sup> Biglow on Estoppel, 4th ed., 516.

<sup>99</sup> 108 Pa. St. 1.

<sup>100</sup> Mor. on Corporations, § 836.

*bound by the statement in the certificates, that the shares were fully paid up. Under these circumstances, the company will be estopped from denying that the representations of its agents were true."*

Another indication that this rule is demanded is to be found in the fact that many of the States are passing statutes on this subject and some of them expressly hold the carrier liable.

At present, however, the conflict of authority is irreconcilable and the rule of law to be applied to any particular case must be determined from the jurisdiction whose laws govern that case.

*T. H. Cobbs.*

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THE fable of the King who left his realm that he might learn what was best in the laws of other governments and apply the result of his observation to the improvement of the disordered state of affairs at home, has a parallel in the prevalent propensity for legislative tinkering. It will be remembered that, on his return, the King of the fable was surprised to find everything—under the administration of his wife, whom he had entrusted with the execution of the laws—in an ideal state of order and prosperity. And not until then did it occur to him that the trouble had been not with the laws but with himself. We enact the best laws that legislators can devise; they fail to work the wonderful results that were anticipated, and immediately there is a loud call for amendment or repeal. Thus the law-maker is kept busy to the extent of wasting energy, and the lawyer wearies of the frequent changes in statutory law. Now, for instance, it is the immigration laws that require amendment; now, the civil service regulations, which either the reformer finds insufficient or which the spoils-politician declares to be a fraud, yet, upon the examination of statutes themselves, they generally appear to be broad enough to cover practically all exigencies, and sufficiently stringent to afford no temptation for their violation. The laws respecting immigration seem to provide for the exclusion—so far as any reasonable regulations may, without being an absolute restriction—of all undesirable foreigners; yet we know that too many such immigrants are admitted. The natural conclusion is that the trouble lies not so much with the laws as with the manner of their enforcement. It is a truism that no law is of much value which is laxly exe-



cuted; but men sometimes overlook the most obvious, and thus often we do not realize that the old law enforced may be better than any loosely-enforced new law that could be devised. There is no little opposition to the civil service law, but much of the fault, when analyzed, will be found to be not so much with the law itself as with its operation, the manner in which it is executed; for every one of progressive ideas must acknowledge the superiority of the merit system over the spoils system, and the present regulations, if rigidly and conscientiously enforced, should afford a method of administering the affairs of the civil service that would furnish no cause of complaint. The prevailing reaction, led by the bar, against the treatment of all ills by legislation, will have a good effect, because most of our law-makers are lawyers, but it is hoped that it will prevent not only the making of useless new laws but also the amendment or repeal of those which would not be ineffectual if given a fair trial.

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THE truth of the saying that "tardy justice is often gross injustice" is frequently emphasized by instances of scandalous delay in criminal procedure, and this not so much in those sections where a ruder form of justice is popularly supposed to prevail as in the States whose courts are held in the highest esteem for their wisdom and justice.

It is especially important that those who have committed crime be punished without delay, because a crime, being an offense against the public, has a more far-reaching influence than any wrong which could be the subject of a civil action. The security of life and property demands that in criminal cases the wheels of justice should move with reasonable promptness. Remissness defeats in a great measure the very end which the punishment of crime is intended to accomplish; then, the execution of the final judgment often comes so late as to have lost much of its force as an object lesson to the evil-minded. And this, though the least tangible, is perhaps the most evil consequence of delay in criminal procedure. Another result that has brought the courts into disrepute is the attempt of the mob to supply the unquestioned deficiency of the law and to enforce the law by lawless means.

If the courts themselves are not altogether responsible for the unwarranted postponement of the punishment of serious crimes—often for several years after their commission—nevertheless it is with the bench that reform must in a great measure have its origin.

## COMMENT.

An interesting point in patent law which, we believe, has never come up in this country, was recently decided by the House of Lords. The case is that of *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler*, 77 Law Times Rep. 573. Defendants, who were large chemists in Basle, manufactured and sent goods which, they admitted, infringed the appellants' patent, to a London firm, through a firm of forwarding agents at Basle, who sent the goods by mail to the London firm according to their directions. Plaintiffs claimed an injunction against both the defendants and the London firm; the latter immediately gave bonds not to infringe in the future and Justice North granted an injunction against the defendants. The Court of Appeal by a vote of two to one, vacated the injunction and the House of Lords has just unanimously affirmed their action.

The real ground of the decision was that the sale was consummated in Basle, the postoffice being the agent of the buyer, especially in this case, as the particular carrier was named by the buyer. Therefore the defendant committed no act in England, nor any act punishable under the English laws. The fallacy of Justice North's reasoning is that he considers that an illegal act is being done and as the defendants are parties to it they may be punished; as he himself says, he doesn't care a straw where the property in the goods was or whether the injunction could be enforced. But Lord Herschell says, "Acts which here would be infringements of the patent, are no infringement, if they are done in a country which is not within the ambit of the patent."

The whole arrangement between the defendants and the London firm seems to have been a scheme to evade the English patent laws. The defendants having no agents in England and performing their part of the scheme entirely without the country, could not, of course, be punished under English laws. The London firm were the only infringers in England of the patent.

In the only analogous cases in this country the articles were patented both in the United States and in the foreign country. *Boesch v. Graff*, 133 U. S. 697, is the leading case. Here it was held that where an article is patented both in the United States and in a foreign country, a dealer residing in the United States cannot import and sell the articles here without the license or consent of the owner of the United States patent, although they were purchased in the foreign country from a person authorized to sell them there. Nor according to *Featherstone v. Ormonde Cycle Co.*, 53 Fed. 110, can the licensee of the foreign patent export and sell in this country the articles without the

consent of the owner of the United States patent. Apparently it would be otherwise if the purchase was made from the owner of or licensee under *each* patent; but if the article was thus sold in the foreign country with a prohibition against importation into the United States, any such importation and sale in the United States would be an infringement (*Dickerson v. Matheson*, 57 Fed. 524). It will be noticed that the action in all these cases was against the vendee, not the vendor. But we do not see how, on true principles of law, the vendor could in the foreign country, whether the article was there patented or not, be enjoined by our courts from selling them.

In determining the many questions which arose under the newly-adopted constitution, one of the essential principles of civil liberty, that no State shall pass a law impairing the obligation of contracts, was laid down by the Supreme Court of the United States in the now celebrated Dartmouth College case. Although this proposition has been since then universally recognized, there has nevertheless been a tendency to gradually narrow the scope of the word "contract," thus preventing many frauds, while still protecting all valid agreements. The case of *Douglass v. Commonwealth of Kentucky*, 18 Sup. Ct. Rep. 199, shows a laudable inclination of the court to so construe this principle as best to guard the interests and morals of the public.

The Mayor and Council of the City of Frankfort had, under a power given by the State constitution, granted in 1875, permission to conduct a lottery, upon an agreement to pay to the city a certain sum of money, and in consideration of an annual license fee of \$2,000, and certain other taxes. This right had been acquired by the plaintiff in error by contract with the widow of the lottery grantee, and he had since then conducted the business. In 1891 a new constitution was adopted in Kentucky, which expressly prohibited lotteries and revoked all privileges or charters heretofore granted. The highest courts of the State had previously in several cases asserted that said contract was valid, and on the faith of these decisions plaintiff in error claimed to have spent large sums of money in increasing the scope of the business.

The Supreme Court of the United States refused to hold itself bound, however, by decisions of a State Court upon a statute alleged to be in violation of the Federal Constitution, and laid down the proposition that no State has a right "to contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries." The rule previously laid down in *Stone v. Mississippi*, 101 U. S. 814, was followed; but the court denied the assertion that the principle there decided was modified by *New Orleans v. Houston*, 119 U. S. 265, in which the revocation attempted was under an act of the legislature, while in the former the act was

justified by power of the constitution itself. Therefore, a grant of permission to operate a lottery is not a contract, such that it cannot be impaired, but is simply a license, revocable at pleasure, and under which no vested rights can accrue, no matter what has been done under a belief that such revocation is impossible.

Another case, that of *Dudley v. James*, 83 Fed. 345, has just been reported, in which Judge Barr in Kentucky, though on somewhat different grounds, adopts the view laid down by Judge Baker in Indiana (see December number YALE LAW JOURNAL page 138), and declares that office deputy marshals cannot enjoin a new marshal from removing them under the Civil Service Rules. He maintains that since the Act of May 28, 1896, as well as previously, the terms of deputy marshals expire, unless otherwise specially provided by law, with the term of the principal marshal, and that thereafter they are not in the Civil Service of the United States, and hence the rule of the President bringing office deputies within the classified civil service has no application after the expiration of the term of the principal marshal, and therefore the deputy has no standing in court to bring a bill for an injunction, even if an injunction would lie.

## RECENT CASES.

## COMMON CARRIERS.

*Damaged Goods—Liability of Carriers.—Morganton Mfg. Co. v. Ohio R. and C. Ry. Co.*, 28 S. E. Rep. (N. C.) 474. Where defendant's agent received a box of goods which had been shipped over several connecting lines, and marked the bill of lading "O. K.," and the goods are found to be damaged at the end of the line, a rebuttable presumption arises that they were injured after they were thus received. If the contents of the box were unknown to the defendant, liability could have been guarded against by examination or stipulation, and failure to do so was negligence (*Dixon v. Railroad*, 74 N. C. 538).

*Telegraph Companies—Rules—Effect on Receiver of Telegram—Presentation of Claim.—Webb v. Western Union Tel. Co.*, 48 N. E. Rep. (Ill.) 670. A rule of a telegraph company printed upon the back of the telegram, requiring all claims for damages to be presented within sixty days is not binding upon the receiver of telegram in the absence of proof that he assented thereto. And where the action is one sounding in tort for a mistake in transmitting the telegram the mere knowledge of such a rule by the receiver will not affect his right to recover. While there may be a contract relation between the sender of the message and the company which under proper condition will bind the sender, there is no contract relation between the receiver and the company, and his proper remedy for damages for its alteration is an action in tort (*Telegraph Co. v. Fairbanks*, 15 Ill. App. 600). As the receiver's remedy is in tort, the company cannot compel a claim for loss to be made in any particular time. As a general rule an action for tort can be brought within any time allotted by the statute of limitations (Gray on Communication by Telegraph, § 75; *Telegraph Co. v. Underwood*, 37 Neb. 315).

*Carriers—Cars for Colored Passengers.—Louisville and N. R. Co. v. Catrow*, 43 S. W. Rep. (Ky.) 443. Section 801 of the separate coach laws (Act May 24, 1892) reading, "The provisions of this act shall not apply to \* \* \* officers in charge of prisoners," construed as an exception in favor of the officer and not of the prisoner; and therefore no action will lie against the railroad in favor of an officer, because a colored prisoner whom he was transporting was obliged by the conductor to occupy the coach reserved for colored people, thereby necessitating the officer's presence in that coach in order to guard his prisoner.

*Railroads—Transportation Facilities—Discriminations.—Little Rock and Ft. S. Ry. Co. et al. v. Oppenheimer et al.*, 43 S. W. Rep. (Ark.) 150. In a year when the crop and shipments of cotton were unusually large appellant railway company furnished sufficient cars at certain points on its route where there were competing lines and superior advantages for shipment to carry all cotton offered, but at certain intermediate points failed to furnish cars sufficient to ship cotton as fast as it was offered. Act of March 24, 1887, sec 1, provides that "All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this State, and no unjust or undue discrimination shall be made in charges for, or in facili-

ties for, transportation of freight or passengers within the State," etc., and section 4 provides that no discrimination in charges or facilities for transportation shall be made between individuals and transportation companies, by any means, nor shall any preferences be made in furnishing cars and motive power, etc. For violations of these sections a penalty is prescribed (sec. 12), which may be recovered by civil action by the party aggrieved. *Held*, the facts did not show such an unjust discrimination as to subject the company to the penalty at the suit of a shipper. So long as all the individuals at any given station are treated alike there can be no discrimination within the meaning of the act. The dissenting opinion maintains, however, that there is nothing in the act limiting the discrimination to individuals. See *Chicago and A. R. Co. v. People*, 67 Ill. 11.

#### EVIDENCE.

*Evidence—Coroner's Verdict—Life Insurance—Suicide.—Germania Life Ins. Co. v. Ross-Lewin et al.*, 51 Pac. Rep. (Col.) 488. In an action to recover upon an insurance policy, *held*, that the duly-certified verdict of the coroner's jury as to the alleged suicide of deceased was not admissible. The statutes prescribing the coroner's duties are construed as making him a conservator of the peace and the purpose of his inquisitions to furnish the foundation for a criminal trial where the death is shown to be felonious. As no judicial powers are conferred on the coroner by statute, the inquest proceedings are extra-judicial and not admissible as evidence to prove suicide. The English rule admitting such evidence is based on purely historical grounds and should not prevail over the injury to public policy which would result from the attempt to corruptly influence the inquests if such testimony were admitted. The Illinois cases, under statutes similar to those of Colorado, declare such evidence admissible. See, also, *Walther v. Ins. Co.*, 65 Col. 417, 4 Pac. 413; *Ins. Co. v. Newton*, 22 Wall. 32. Campbell, J., concurring specially, asserts the admissibility of such testimony, citing especially the common law and Illinois rule.

*Bills and Notes—Liability of Parties—Oral Testimony.—Shuey v. Adair*, 51 Pac. Rep. (Wash.) 388. An agreement between the maker, payee and indorser of a negotiable note, that the payee shall look to the indorser and not to the maker for payment, cannot be proved by oral evidence in order to relieve the maker of his responsibility. The cases on this point are in apparent and bewildering conflict, and many of them seem at first sight to sustain the admissibility of such testimony. But the cases where such evidence is rightly admitted fall within one of three principles, viz.: (1) Where the check or order drawn by the agent discloses the principal, see *Brockway v. Allen*, 17 Wend. 40; *Whitney v. Wyman*, 101 U. S. 392; *Hill v. Ely*, 9 Am. Dec. 376; *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, and cases there reviewed; (2) where there is enough on the face of the written instrument to render it doubtful whether it was the intention to bind the agent or the principal, see *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326; *Michels v. Olmstead*, 14 Fed. 219; *Metcalf v. Williams*, 104 U. S. 93; *Kean v. Davis*, 21 N. J. Law 683; *Mechem, Ag.* § 449; and, (3) where the instrument was to be delivered upon the taking effect of some future stipulated condition, and it has been delivered before such condition is performed, see *Small v. Smith*, 1 Denio. 583; *Bank v. Lucknow*, (Minn.), 35 N. W. 434; *Westeman v. Krumweide*, (Minn.), 15 N. W. 255. As a matter of course the defense of fraud or mistake is always available, see *Hill v. Ely, supra*,

and *Small v. Smith*, *supra*. As casting some light upon the decisions of the Supreme Court of the United States on the point, and its construction of the Pennsylvania cases, which are concededly the cases which support the admissibility of this sort of testimony, see *Bust v. Bank*, 101 U. S. 93.

*Action for Services—Incompetency as a Defense—Rebuttal Evidence.*—*State* (Continental Match Co., prosecutor) *v. Smith*, 38 Atl. Rep. (N. J.) 969. Plaintiff, an artisan, brought a suit for breach of a contract of employment, the defense being incompetency, justifying his discharge. The lower court admitted evidence showing plaintiff's unsatisfactory work in another factory. To the claim that such admission was erroneous on the ground that the acts done in another place were *res inter alios actæ*, the court held such evidence to be admissible. See *Brierly v. Mills*, 128 Mass. 291.

*Carriers—Injury to Passengers—Evidence—Statements of Plaintiff.*—*West Chicago St. Ry. Co. v. Kennelly*, 48 N. E. (Ill.) 996. The testimony of a witness in an action for personal injury that the plaintiff "complained" of her injury the morning after the accident is not inadmissible as being a declaration in interest, but is admissible as a mere exclamation. But a statement by the same witness that plaintiff "complained of her side, and under the spine, in the back and this ankle," the morning after the accident, is not competent, because the statements of the plaintiff may have been made with a view to future litigation, and therefore declarations in interest. Statements of pain and suffering, past and present, are inadmissible in an action for personal injuries unless made to a physician or medical expert for the purpose of treatment or other legitimate purposes, or are made at the time of the injury so as to form part of the *res gestæ* (*Railroad Co. v. Sutton*, 42 Ill. 40; *Quaife v. Railway Co.*, 28 Wis. 524).

## TAXATION.

*City Lots—Assessments for Street Improvements—Election of Remedies.*—*City of Cincinnati v. Emerson*, 48 N. E. Rep. (Ohio) 667. An owner of a city lot, who has two grounds for contesting the validity of an assessment imposed thereon for street improvements, one of which is common to him and the abutting owners of other lots, and the other pertains to his lot only, and who elects to bring an action enjoining the collection of the assessment in his and the abutting owners' behalf, is deemed to have waived the right to bring an action on the ground which pertained to his lot alone. A judgment rendered under the first action refusing the relief sought is a bar to the second action, even though the first action, if maintained, would have defeated the assessment altogether, while the second action, if successful, would have merely reduced the assessment against the one particular lot.

*Privilege Tax—Exemption—Class and Special Legislation—Motion of Legislature.*—*Knoxville & O. R. Co. v. Harris, Comptroller*, 43 S. W. Rep. (Tenn.) 115. A statute—Acts 1895 (Ex. Sess.), p. 592, c. 4, § 7—providing that specified corporations should pay specified taxes on specified privileges, and among them railroad companies, not paying an *ad valorem* tax to the State, discloses an obvious intention of the assembly to treat as a tax privilege the business of the railroad and not the abstract condition of "not paying an *ad valorem* tax to the State." Such a tax is not objectionable class legislation, in that there are only two such companies, because it applies equally to all corporations in a similar condition, and makes a natural and

reasonable classification. Neither can the validity of the tax be attacked on the ground that the motive in passing the act was to deprive the railroads of their advantage of exemption from *ad valorem* taxation. Also, that a company's charter provides "that its capital stock, the dividends thereon, and the road and fixtures, depots, etc., shall be forever exempt from taxation, provided the stock or dividends, when the dividends exceed legal interest, may be subject to taxation in common with money at interest, but no tax shall be imposed so as to reduce dividends below legal interest," does not exempt such company from privilege taxation.

*Taxation—Railroad Machine Shop.—Western N. Y. & Pa. R. Co. v. Venango County*, 38 Atl. Rep. (Pa. 1088). *Held*, in an action to enjoin the collection of taxes, that a machine shop belonging to a railroad company, and used exclusively for repairs in its own business, is not subject to local taxation. Case of *East Pa. R. Co.*, 1 Wash. (Pa.) 428, distinguished. The test is whether the property under discussion is used exclusively in the distinct and direct furtherance of the object for which the charter of the company was granted.

*Inheritance Tax—Validity—Estates Previously Probated.—Gels-thorpe, County Treasurer, v. Furnell, et al.*, 51 Pac. Rep. (Mont.) 267. An inheritance tax is not void in so far as it applies to estates probated, but not distributed until after it comes into effect. Although the privileges and rights of heirs and legatees to take and receive shares of the property of a decedent are vested immediately upon the death of the testator or intestate (see Sec. 1794, Civ. Code); yet the term "vested rights" should not be set up as "a shield of protection" against all considerations designed by the legislature to promote the general welfare, or establish an advanced public policy for the State. *Cooley, Const. Lim.*, p. 437. The right, moreover, is subject to the control of the courts for distribution and is dependent upon the laws for its protection. See *Carpenter v. Com.*, 17 How. 456; *Succession of Oyer*, 6 Rob. (La.) 504; *Succession of Deyraud*, 9 Rob. (La.) 357.

## TRADE-MARKS.

*Trade-Mark—Geographical Name—Unfair Competition.—Gage-Downs Co. v. Featherbone Corset Co.*, 83 Fed. Rep. 813. A Chicago manufacturer, who for years has made corset waists and sold them as "Chicago Waists," until the goods under such name have become known to the trade as the goods made by him, may enjoin another in a different city and State from selling his goods as "Chicago Waists." The appropriation of the name of the place where goods are manufactured is not often protected, but where by the use of the name it has acquired a secondary signification, as a mark denoting the manufacturer rather than the place where the goods are made, and it is the manifest intent of the adverse user to derive advantage from the reputation the goods thus branded have attained in the market, it will be enjoined.

*Trade Marks and Trade Names—Labels of Laborers' Union.—Hetterman et al., v. Powers et al.*, 43 S. W. Rep. (Ky.) 180. That the members of certain voluntary trade unions of cigar makers are not strictly "in business" for themselves, but are employed for wages in producing cigars to which they have attached labels indicating such cigars to be the exclusive product of their labor, is no defense to an action brought to restrain others from using these labels. There is nothing objectionable in such labels, as denouncing other



makes of cigars than union-made ones, in that the organization which makes the cigars upon which the labels are placed is described as "opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship." The decisions on the question of the validity of such labels are not uniform. Opposed to enjoining the infringement are *Werner v. Brayton* (Mass. 1890) 25 N. E. 46; *Union v. Conkaim*, 40 Minn. 243, 41 N. W. 943; *McVey v. Bundel*, 144 Pa. St. 235, 22 Atl. 912; *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812. Sustaining the validity of the labels as "trade-marks," see *Strasser v. Moonelis*, 55 N. Y. Super. Ct. (affirmed, 15 N. E. 730); *Cohn v. People*, 149 Ill. 486, 37 N. E. 60. See also *State v. Hagen*, 6 Ind. App. 169, 33 N. E. 223; *Carson v. Ury*, 39 Fed. 777. In a number of States—and in Kentucky since this case arose—statutes have recently been passed recognizing the right of wage earners to organize and select appropriate symbols to designate the results of their handiwork.

#### MISCELLANEOUS.

*Bank—Acting as Agent—Liability.*—*Pefforday v. Citizens' National Bank of Latrobe*, 38 Atl. Rep. (Pa.) 1030. Plaintiff entrusted defendant national bank with several shares of railroad stock, to be forwarded by them and sold according to his direction by the bank's brokers. The stock was sold and the broker's check forwarded to the bank which instantly placed the amount to the credit of the plaintiff. Meanwhile the brokers had failed, and the bank having forwarded the check it was returned protested. Defendant thereupon charged back to the plaintiff the amount of the check, and the plaintiff, having overdrawn his account according to the latter accounting, sues the bank for the balance due him according to the first accounting. *Held*, that plaintiff could recover. A national bank in buying or selling stock exercises no function pertaining to it as a bank. In this case it was a voluntary action on the part of the bank and having assumed the liability of an agent it was subject to the rules governing that relation. In applying the amount of the check to the plaintiff's credit they acted voluntarily and were liable for any loss arising therefrom. *Paul v. Ginn*, 165 Pa. St. 139, 30 Atl. Rep. 721. Judge Mitchell, dissenting, based his opinion on the ground that the relation existing between the defendant and plaintiff was that of bank and depositor rather than that of principal and agent.

*Divorce—Adultery—Condonation.*—*Gorser v. Gorser*, 38 Atl. Rep. (Pa.) 1015. In an action for divorce by a husband it was shown that the wife had committed various improprieties which she had admitted to him, but denied actual guilt. Thereupon he had accepted her explanation but had never cohabited with her afterwards. Proof of her guilt after that time having been established, it was *held* by the court that such previous condonation would not prevent the decree from being granted.

*Appeal—New Trial—Surprise.*—*Allen v. Chambers et al.*, 51 Pac. Rep. (Wash.) 478. The surprise contemplated by the statute as a ground for a new trial must relate to a matter of fact, and not of law; but where it is shown that appellants neglected to introduce material evidence shown by their affidavits to be in their possession, relying on a ruling of the supreme court declaring such testimony not necessary for their view of the case, which ruling was apparently directly overthrown by a subsequent decision of the court, rendered after appellants' case had been submitted to the trial judge, a new trial will be granted. See *Starkweather v. Loomis*, 2 Vt. 573.

*Criminal Law—Murder—Insane Delusions—Instructions.—People v. Hubert*, 51 Pac. Rep. (Cal.) 329. An instruction was given in a murder trial enumerating and setting out the special beliefs which the defense claimed constituted the insane delusion or monomania which impelled the defendant to commit the homicide, and the jury were told that if the defendant entertained such beliefs, and they were unsound, existing only in his imagination, then they were insane delusions, as a matter of law. *Held*, error. There is no such rule of law: matters of science must always be proven, and are treated as matters of fact, and the court should not instruct in regard to them. That these matters are discussed in legal treatises or judicial opinions does not convert them into propositions of law.

*Constitutional Law—Police Regulations—Restrictions on Interstate Commerce—Inspection of Sheep—Validity of Statute.—State v. Duckworth*, 51 Pac. Rep. (Idaho) 456. Section 14 (Sess. Laws, 1895, p. 125), and Sections 4 and 6 (Sess. Laws, 1897, p. 115), amendatory thereof, known as the "Scab Laws," concerning the appointment of a sheep inspector, his fees for inspection, etc., and declaring it unlawful to bring sheep into the State unless they have first been inspected and dipped as provided by these acts, are repugnant to Section 8, Article I., of the Federal Constitution, relating to the regulation of commerce. They place an unnecessary burden and restriction upon interstate commerce and are not a valid exercise of the police power, as interpreted in *Gibbons v. Ogden*, 9 Wheat. 1. Said sections also discriminate against non-resident sheep owners in favor of resident owners to an extent repugnant to the Federal Constitution, Section 2, Article IV. The case is distinguished from those involving the constitutionality of what are known as "Texas Fever" statutes. Texas cattle are the natural *habitat* of the latter disease, while it is conceded that Idaho sheep are no more free from the "scab" than the sheep of other States. But see, for a "Texas Fever" decision, *R. R. Co. v. Husen*, 95 U. S. 465. Compare *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862.

*Defective Highways—Proximate Cause.—Davis v. Inhabitants of Longmeadow*, 48 N. E. Rep. (Mass.) 774. Plaintiff's team became mired in the highway and while in the efforts and under the strain of getting it out, one of the horses burst a blood vessel and soon after died. *Held*, that if the driver reasonably thought he could get through the mud hole, and, exercising due care, made reasonable efforts to extricate the team therefrom, the bursting of the blood vessel and the horse's death were the direct and immediate consequence of the defect in the road.

## BOOK REVIEWS.

*Bouvier's Law Dictionary.* By John Bouvier. New edition, by Francis Rawle. Volume I., A to I. Sheep, pages xviii., 1127. Boston Book Co., Boston. 1897.

Every established lawyer has a Bouvier and will welcome this new edition. The younger members of the bar have been led into other fields somewhat, probably from the lack of a revised Bouvier. The present edition is enlarged and every topic worked over by Mr. Rawle, the editor of the preceding edition. Branches of the law which have shown a marked development in the last fifteen years have received special attention. While there may be a difference of opinion as to the advisability of making a dictionary of law a compendium of all legal knowledge, there can be no doubt that in this instance the encyclopædic work is most full and accurate, though compressed. The size of the volumes, each containing over a thousand pages, with the small type commentaries on the titles defined, ensures the presentation of everything of value, and the giving of clues to its wider treatment. No more substantial and trustworthy "cornerstone of a lawyer's library" could be recommended. The second volume is promised in about three months.

*Abbreviations Used in Law Books.*—Reprinted from the "Lawyer's Reference Manual of Law Books and Citations." By Charles C. Soule. Sheep, pages iv., 153. Boston Book Co., Boston. 1897.

Pending the publication of a new edition of the manual that part of the text most constantly needed is issued under a separate cover. The list embodies not merely the ordinary citations of reports and text-books, but all forms of abbreviations, correct or incorrect, which have been used, so arranged as to enable the lawyer to make out, without unnecessary delay, the meaning of any abbreviation he finds in a book or brief. The index is brought down no farther than 1883, the year of the last edition of the Manual.

*Celebrated Trials.* By Henry Lauren Clinton. Cloth, pages x., 626. Harper & Bros., New York and London. 1897.

"Celebrated Trials" follows "Extraordinary Cases," and gives us inside information of many famous trials, mostly criminal, now fast passing out of memory. This volume describes most entertainingly the Cunningham-Burdell murder case, and the trials for differing crimes of the famous New York politicians—Mayor A. Oakey Hall, Wm. M. Tweed and Richard Croker. Mr. Clinton's style smacks of the address to the jury, and current clippings from the newspapers add to its raciness. Many of the arguments to the court and jury are printed and are really worthy of study by the young lawyer; as also Mr. Clinton's methods of conducting a trial in which

he was remarkably skillful. The side-lights cast upon Daniel O'Connor and other great lawyers of the seventies are especially entertaining to us who can know them only by name and rumor.

*Handbook of the Law of Evidence.* By John Jay McKelvey, of the New York Bar. Sheep, pages xii., 468. West Publishing Co., St. Paul, Minn. 1898.

This, the latest of the "Handbook Series," while retaining the features of the series is distinctively a book for students. With this idea in view the authorities cited are few in number, but consist of the leading cases on each topic. Extended statements of many of these are inserted in the text and footnotes. The author confesses himself indebted to a great extent to Professor Thayer's collection of cases, and has made use of extracts from magazine articles by the same writer. While a bird's-eye view of the law of evidence is presented it is submitted that a student could hardly gain a working knowledge of the subject from this book alone. Could McKelvey be used with Thayer's cases, it seems to an humble adherent of the Dwight system that the cases would expand the text-book, while the book would furnish a needed guide in the study of those cases.

*Commentaries on the Law of Trusts and Trustees.* By Charles Fisk Beach. Two volumes. Sheep, pages ccxxxiii., 1873. Central Law Journal Company, St. Louis, Mo. 1897.

No work on this subject has been published in so long that the profession was in real need of a recent discussion of its doctrines and a citation of late cases. The latter point has been most admirably looked after. Over eighteen thousand cases are cited. Contrary to what might have been expected from that immense number, the notes are not mere columns of cases. Almost every foot-note contains extracts from the opinions and a discussion of the citations. As to the text it is understood that prior to its acceptance by the publishers one of the most critical members of the bench of Missouri examined the manuscript and gave the work his entire commendation. "A feature of these volumes by which they are distinguished from the older works on this subject, consists of the numerous expositions of equitable doctrines by the great Lord Chancellors of England, and by the most eminent American jurists. These commentaries on the rules underlying their decisions are taken from reported opinions, commencing with an early period and coming down to a recent date. \* \* \* These statements are the law of to-day, and it is believed that they are in such form as to be of special value, alike to the jurist and to the advocate." The name of Beach is so closely associated with treatises on equitable doctrines that a distinction must be made. The author of this work is not Charles Fisk Beach, Jr., of New York, but the father of that well-known writer, and hails from Indiana. The paper, type and binding of the volumes are of the highest order, and in the best law-book style.

## MAGAZINE NOTICES.

Among the articles which have appeared in legal publications during the past month the following may be noted :

*Albany Law Journal :*

- Jan. 22.* Excessive Legislation, . . . . . Robert Earl.  
*Feb'y 5.* Methods of Legal Study with Reference to the  
 Present Condition of the Law, . . . Alex. Hirschberg.

*Central Law Journal :*

- Jan. 21.* Sales as Cover for Usury, . . . . . J. A. Webb.  
 28. Oral Cruelty as Ground for Divorce, . . . Irving Browne.  
*Feb'y 4.* Parol Evidence Relative to Negotiable Securities,  
 S. S. Merrill.

*Green Bag—February :*

- Judicial Killing, . . . . . Florence Spooner.  
 The Law of Muru, . . . . . G. H. Westley.

*Michigan Law Journal—January :*

- A Legal Phase of the Boycott, . . . . . P. L. Edwards.

*Western Reserve Law Journal—January :*

- The Right to Change Beneficiaries among Benevolent Societies and Fraternal Orders, . . . . . F. S. McGowan.  
 Bills of Exceptions, . . . . . F. A. Henry.

*Harvard Law Review—February :*

- Liability of Landowners to Children entering without Permission, . . . . . Jeremiah Smith.  
 The History of Trover, II., . . . . . J. B. Ames.  
 Non-Public Corporations and Ultra-Vires, . . . J. W. Lilienthal.

# YALE LAW JOURNAL

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## WHAT CAUSES OF ACTION MAY BE JOINED IN ONE COUNT UNDER THE CONNECTICUT PRACTICE ACT.

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The following memorandum of decision was rendered by Hon. Samuel O. Prentice, Judge of the Superior Court, in February, 1898, and is now on file in the office of the Clerk at New Haven.

The action which is now pending in that Court is for the loss of goods shipped by the plaintiff over defendant's railroad. The plaintiff stated in one count that the goods were delivered to the defendant as a common carrier at common law; that at the time of the delivery of the goods certain bills of lading were also delivered to and accepted by the defendant, but that there was no consideration for the bills of lading, that they were unreasonable and unjust in their terms, and that therefore they were not binding contracts, and that the defendant had no right to the limitation of liability expressed therein. Under these circumstances, the plaintiff claimed that, in spite of the bills of lading, the defendant was liable as a common carrier at common law, and alleged the failure of the defendant to carry and deliver the goods. The plaintiff went on to say that if the bills of lading were valid, then the defendant was liable because the goods were lost through its negligence.

Defendant moved to correct the complaint by requiring the plaintiff to state upon which cause of action it relied, or to separate the causes of action. The case was argued at length, plaintiff relying principally upon the decision of the Supreme Court of Connecticut in the case of *Craft Refrigerating Co. v. Quinpiac Brewing Co.*

EDITOR.

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THE WINCHESTER REPEATING  
ARMS COMPANY

vs.

THE NEW YORK, NEW HAVEN  
AND HARTFORD RAILROAD  
COMPANY.

Superior Court,  
New Haven County,  
the 9th day of February,  
1898.

MEMORANDUM UPON MOTION *DE* SUBSTITUTED COMPLAINT.

This complaint in one count contains statements of divers facts, some pertinent to a right of recovery upon one ground, and some upon another. The plaintiff justifies this combination of allegations in one count, upon the authority of *The Craft Refrigerating Company v. The Quinnipiac Brewing Company*, 63 Conn. 551.

The question is thus raised as to the scope and effect of this oft-cited case. By the profession generally it has apparently been received as it has by counsel for the plaintiff as sanctioning as proper pleading the filing in court as a complaint of any leaf of history between persons which may be said to relate to any single transaction, using that term in its most comprehensive sense, however varied and many-sided that transaction may be. As necessary sequels to this manner of pleading it is conceived that the plaintiff may shift his position as often as he is pleased or forced to do so, as the case progresses, as long as he keeps under the cover of any of the averments of his complaint; that the opposite party and the court are put to the hazard of searching out at their peril for defense, trial, ruling and decision, the many causes or rights of action which may be concealed within its multitudinous allegations, and that the plaintiff has under it a *carte blanche* to recover for any cause of action which his opponent shall fail to discover or successfully defend.

Against such doctrine I must protest as being subversive of the very purpose of pleading and paving the way for all manner of uncertainty, confusion, pleading entanglement and even ultimate injustice. If we have come to the point where such pleading is permissible we have indeed taken a long step backward towards that primitive time when parties appeared in person before the magistrate and told their story in open court, and the magistrate adjudged as upon the whole seemed to him just and right. Modern conditions, I fancy, do not admit of such methods.

Phillips, in commenting upon the requirement of the codes

for separate statement of causes of action, makes the following pertinent remarks:

"Such statement of causes is clearly indispensable to an orderly system of pleading. In no other way can the legal sufficiency of any one cause be tested by demurrer; in no other way can different defenses be made to the different causes; in no other way can separate and distinct issues be made and tried; in no other way can the introduction of evidence be intelligently conducted; and in no other way can the record be made clearly to show what matters have been adjudicated and how decided. The provision for the joinder of distinct demands in one action is for the convenience and economy of litigants, and its object may be promoted by liberality in its application, but the requirement that causes of action when joined shall be separately stated is to enhance the certainty, the precision and the safety of procedure, and its object can be promoted only by enforcing it with reasonable strictness." (Phillips on Code Pleading, Sec. 202.)

Such doctrine, however, as that to which I have referred as having been drawn from the *Craft* case, I am confident is not supported by that case. It is doctrine which I believe to be plainly repugnant to the express provisions of our Practice Act and of all known codes, and I fail to discover what there is in the opinion in the *Craft* case, when properly interpreted, which warrants the conclusions which have been drawn from it.

The doctrine of that case, as I understand it, is simply and only this: that where a single inseparable state of facts gives rise to two or more rights of action, or where the plaintiff upon such statement of facts may upon differing constructions thereof be entitled to differing relief, the complaint in a single count, setting up these facts may, in the first case entitle him to demand and have any of the several kinds of relief which the facts in any aspect of them support, or in the second case, to demand alternative relief appropriate to the different constructions which the law may place upon the facts, and have such relief as the true construction warrants.

There are many states of fact which give rise to more than one right of action, as for instance, one in contract, and another in tort. A complaint setting up such states of fact may contain matter pertinent to each right of action, and no matter not pertinent to both. The *Craft Refrigerating Company* case very properly holds, as I shall have occasion to further notice later, that such a complaint in one count is good; that the plaintiff may go to trial thereon without electing which right of action



he will pursue, and that he may thereunder be given such relief as the facts may warrant.

There, however, may be other conditions, to wit:

1. A count may contain allegations, all of which are appropriate to one right of action, while at the same time a portion of them are also appropriate to and sufficiently support, another right of action, the remainder being altogether inappropriate to such second right of action.

2. A count may contain allegations, a part of which are pertinent and appropriate, and a part impertinent and inappropriate to each of two or more rights of action.

With respect to such counts the principle of the *Craft* case does not apply. To so hold would be to violate the clear and express provisions of the Practice Act. Section 878 of the General Statutes provides what may be joined in a complaint, and how such joinder may be made. The pertinent requirements are, (1) That several causes of action may, under certain conditions be joined in one complaint, and (2) that such causes of action so joined must be separately stated.

Another pertinent provision is that which permits the joinder in one complaint of causes of action "arising out of the same transaction, or transactions connected with the same subject of action."

In order to arrive at a correct understanding of what the effect of this section of the statutes is, it is necessary to have a clear conception of the meaning of the terms which it employs, to wit, "right of action," "cause of action," and "transaction."

A "right of action" is the secondary right to relief which springs from the invasion of some primary right. It is the right to relief appropriate to the facts from which the right of action springs.

A "cause of action," on the other hand, to quote the language of *Pomeroy*, is the situation or state of facts from which a "right of action" springs. The facts from which a remedial right—that is, a right to relief—arises, constitutes the "cause of action."

Phillips, in commenting upon this distinction between a "right of action" and a "cause of action," uses this language: "From the foregoing definitions of 'right of action' and 'cause of action' it will be seen that the former is a remedial right falling to some person, and that the latter is a formal statement of the operative facts that give rise to such remedial fact." (Phillips on Code Pleading, Sec. 31).

A "transaction" is something quite apart from a "right of action," and something more comprehensive than a "cause of action." The term is one which has been seldom defined and to which it is hard to give a definition helpful in practical applications and suited to all circumstances. Our Supreme Court in the *Craft* case, however, has said that a transaction "consists of an act or agreement, or several acts or agreements, having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered."

A definition in different language, but to the same general effect, might be made upon the basis of Pomeroy's analysis somewhat as follows: "A single continuous connected proceeding, negotiation, or conduct of business between parties, characterized by a unity of action and circumstance, and forming one affair."

Definitions aside, however, it is certain that from a single "transaction" several "causes of action" may arise, each giving to the injured party one or more "rights of action."

In this connection it ought to be observed that a "right of action" is to be distinguished from the object of the action. The object of the action is the relief which is sought. The "right of action" is the right to that relief which arises from the facts which constitute the "cause of action." In actions at law the object, whatever the "right of action" may be, is generally damages.

A "right of action" at law always arises from the existence of a right and the invasion of it by some wrong on the part of another. The "cause of action" is the facts which establish the right and the wrong. Its statement is therefore only a statement of these facts. Such statement is single if it sets up only one right invaded by one wrong. It is double if it sets up either two rights invaded by one wrong or one right invaded by two wrongs.

If now we examine Section 878 with these distinctions and principles in mind, its interpretation becomes clear, and its operation simple. Where there is a single state of facts from which a right to relief arises, there is but one "cause of action." A count, therefore, which sets up such a state of facts, and that only, states but one "cause of action" in the sense in which that phrase is used respecting the joinder of actions, no matter how many rights of action may spring from these facts. Of course, causes of action might be differentiated, not only with respect to

the facts averred, but also with respect to the nature of the relief sought upon the facts. This narrow distinction, however, is not the logical one, since the prayer for relief is no part of a count and no part of the cause of action. Neither is it the distinction contemplated by the Practice Act. The separation of causes of action is not to be determined by the relief demanded, but by the actionable facts alleged, from which the right to redress is claimed to flow. Upon this construction there can therefore be no joinder of causes of action in a count which sets up a single set of facts, all pertinent to whatever relief may be demanded upon those facts. Such a count of necessity alleges but one right and one invading wrong. Such in the opinion of the court was the single count complaint in the Craft case.

If now we turn to counts of the second variety heretofore specified, to wit, those containing allegations all of which are appropriate to one "right of action," while a portion of them are also appropriate to and sufficient to support another "right of action," the remainder being altogether inappropriate to such second "right of action," the situation becomes at once and radically changed, if the plaintiff is to be permitted to treat such counts as good ones for rights of action to which all their allegations are not appropriate. In such cases there is plainly a joinder of causes of action. The instant that there is combined in one count facts appropriate to one cause of action and facts inappropriate to it, but appropriate to another cause of action, there arises a joinder of causes of action. This is necessarily so since, as we have seen, causes of action are only the facts from which rights of action spring. A statement of a cause of action being only a recital of facts—a recital of the facts from which the right of action arises—the consequence is inevitable that wherever there is contained in a count material allegations inappropriate to a statement of a cause of action therein, but pertinent and appropriate to another cause of action, there is a joinder of causes of action, since there is a joinder of facts issuing independently in different rights of action.

The practical result in such a case should be that the count should be regarded as one for the right or rights of action to which all its material allegations are appropriate, and not one upon which the plaintiff might recover for a right of action to which only a part of its material allegations are appropriate. Having himself inserted the additional allegations which give character to the count as one for those rights of action which all its recitals support, he should be held to have chosen his ground as he has

stated it, and not permitted to change it by treating his own material averments as surplusage. Such a count, under such an interpretation, would not contain a joinder. It would be simply a count for a single cause of action, to wit, that cause of action which all its material averments together support.

Counts of the remaining class, to wit, those containing allegations a part of which are appropriate and a part inappropriate to each of two or more rights of action, would, for reasons already discussed and which need not be repeated, contain a joinder.

If I am correct in this interpretation of Section 878 its provisions become easily intelligible, and their application simple and satisfactory. There is no longer any mystery as to what a count may properly embrace, nor mystery as to what rights of action a count may support. A single count may contain the statement of a single cause of action, and that only. It is such a count, if all its material averments are pertinent and appropriate to the statement of any one cause of action. If its allegations are in part appropriate and in part inappropriate to each of two or more causes of action there is a joinder of causes of action. Where there is a statement of a single cause of action the plaintiff may have relief for any right of action to which it entitles him. He can have no relief for rights of action to which all the material allegations are not pertinent and appropriate.

The principles which I have thus laid down are general ones. In their application to actual conditions, however, they are not without natural and necessary limitations. Circumstances will sometimes arise under which, from necessity, or convenience amounting to a practical necessity, their strict enforcement will not be required. These circumstances will especially arise where equitable relief is sought, either as preliminary to or in connection with, legal relief, or alone, where different forms of equitable relief are demanded. Equitable causes of action are frequently not susceptible of that clear and distinct separation from each other and from the circumstances of the transaction out of which they arise that legal causes of action are. Legal rights of action are generally clearly differentiated from each other, and the facts which issue in them are generally easily separable in statement from other connected facts. Equitable rights to relief oftentimes run more closely into each other, and the facts which issue in them are frequently not conveniently susceptible of an independent and unassociated statement. The

Practice Act lays down no hard and fast rules which neither yield to necessity nor recognize that pleading is but a means to an end—the end that issues may be framed and relief demanded and given in a way most conducive to the convenient, orderly, and proper administration of justice and equity.

The Craft case calls attention to one of these limiting principles, where it says that "separate and distinct causes of action within the meaning of the rule are those which are separable from each other, and *separable by some distinct line of demarkation.*" The opinion observes that in one sense every cause of action must be separate and distinct from any other, while in another sense causes of action might differ from each other only in that distinct and separate claims for relief issue from the same state of facts.

The Practice Act seeks to require nothing impossible, nothing superfluous, nothing which occasions inconvenience without a corresponding return. It therefore does not demand separation of causes of action where the only distinction between them can be that which arises from the distinct kinds of relief which may be demanded from a given state of facts; or where a separation by some distinct line of demarkation is impossible; or where the ends of good pleading are better and more simply reached by a departure from strict requirements. The principles which I have laid down are therefore simply general ones which are to govern the pleader, unless there is some sufficient controlling reason for action otherwise. They are not to be applied in any technical spirit or with microscopic exactness, but to the end that, upon the one hand, the many and grave evils of double pleading may be avoided, and, upon the other, that parties may arrive at issue as simply, directly and distinctly as they reasonably and properly may.

Having thus discussed principles without much reference to Connecticut authority, let me now inquire if there is such authority for contrary views. I submit that there is none. The Craft case is the only one which has discussed this general question to any extent. If it be carefully studied, I believe that in its doctrines there will be found nothing subversive of the positions I have here taken. The court in that case clearly regarded the complaint as one setting up only a single inseparable state of facts from which two rights of action sprang—a single cause of action in the broad and true sense of that term—or at least two causes of action incapable of separation by any true line of demarkation.

Much of the difficulty, I fancy, which has arisen in the interpretation of Section 878, and of the Craft case, has come from a failure to distinguish a cause of action from a transaction. These terms have been used so loosely and interchangeably that the distinction between them which the codes and our Practice Act emphasizes is too often lost sight of.

The prevalent notion that all that one now needs to do is to tell his story, whatever that story may be, and leave to the opposite party and the court the duty of guessing out what his cause of action is, has, I must believe, its origin in this misunderstanding and the consequent misconception of what the Practice Act requires to be stated. The *cause of action*—that is, the facts from which the plaintiff's right or rights of action spring—are required to be set out. No semblance of authority is given for setting out a *transaction*, unless indeed the transaction in its entirety constitutes a cause of action. The plaintiff is compelled to discover from the acts and occurrences of the transaction his cause or causes of action, and set them out separately. He is not required, as the Craft case says, to construe his right under a cause of action and give it a label, as he was obliged to do in common law pleadings; but he is obliged to select his cause of action, and make known his claimed actionable facts which constitute it. The story which the Craft case says he is permitted to tell as plainly and concisely as may be is the story which makes up the cause of action, and not any longer or more comprehensive story—not the story of a transaction. The Practice Act is careful to make this distinction between a transaction and a cause of action, and to impose the duty of separate allegation. It contains express recognition of "several causes of action arising from the same transaction, or transactions, connected with the same subject of action."

Having thus laid down the rules by which counts are to be tested respecting joinder of causes of action therein, it remains to apply them to the complaint under review. It was apparently, and I believe I may fairly say, confessedly, framed to enable the plaintiff to recover thereunder upon any cause of action it might ultimately appear that it had growing out of the matters covered by its allegations. If not precisely hydra-headed, it certainly looks in at least six different directions. Within it are matters which might be held to justify a recovery under any one of the following conditions:

1. A recovery for the breach of the common law duty of a common carrier where no express agreement of carriage was made.

2. A recovery for the breach of the common law duty of such carrier receiving goods for transportation without an express agreement for carriage, which breach of duty consisted in its active negligence.

3. A recovery for the breach by such carrier of an express contract of carriage.

4. A recovery for the destruction of property delivered to such carrier under an express contract, which being unreasonable and unjust in its terms, and improperly exacted from the shipper, may not protect it from responsibility for the destruction of the goods.

5. A recovery for the breach of duty of such carrier by reason of its own negligence, notwithstanding an express contract of carriage was made.

6. A recovery for negligence pure and simple.

The plaintiff disclaims any thought of preparing the way for recovery upon the latter ground, but expresses its desire to have the count so phrased that it would support a recovery if the evidence should disclose the existence of either of the other conditions.

I need not say that in my opinion a count of this kind is improper.

The fundamental fault in the complaint is that it sets out the whole transaction. The plaintiff has not sought to gather from its incidents its cause of action and set that up, or its causes of action and set them up separately.

It is clear that under the principles I have laid down the count is not a good one for either the first, second, third, fourth or sixth causes of action enumerated. The presence therein of material averments inappropriate to either one of these causes of action, but pertinent to other causes of action, leads to this result. If the count can upon its most liberal construction be justified as an attempt running through all its allegations to set up one cause of action, it must be one for the destruction, through the negligence of the defendant carrier, of goods delivered to it for transportation for hire under a special contract, which, being unreasonable and improperly exacted, could not exempt it from responsibility for such negligent destruction.

Even in this aspect of the count it is not free from faults. If it is sought to allege the existence of a special contract of carriage, the averments are neither appropriate nor sufficiently clear. Certain evidential facts are recited, but it is nowhere apparent, much less distinctly alleged, whether it is claimed

that a contract existed or not. It is impossible to gather from the averments what the claimed state of facts, and therefore what the cause of action is. It is not possible to discover what right of the plaintiff it claims to have been invaded, or by what precise wrong it has been invaded.

Section 88o provides that all pleadings shall contain a plain and concise statement of the material facts upon which the pleader relies, but not of the evidence by which they are to be proved. Another requirement of Code Pleading is, that all allegations shall be direct and certain. Clearly these requirements are not met in the present complaint.

The defendant's motion is granted to the extent that the plaintiff is ordered:

1. To separate into distinct counts its several causes of action, if it desires to rely upon more than one.
2. To state such cause or causes of action in distinct and certain averments, which shall avoid recitals of evidential matter, allegations of facts which are not ultimate and operative facts, and averments of facts which are not material to the cause of action being stated.

*Samuel O. Prentice.*



## THE LAMPSON WILL CASE.

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William Lampson, a resident of LeRoy, N. Y., died February 14, 1897, at the age of fifty-seven years. Seven weeks before his death he executed his last will and testament. His personal property amounted to over \$400,000, and he left real estate of the value of about \$100,000. The entire estate, except about \$35,000, is given to Yale University, the disposing clause beginning, "I give and bequeath unto my alma mater, the corporation of Yale College." Mr. Lampson was a bachelor and his nearest relative is an aged aunt, Mrs. Laura A. Brooks, residing in Minnesota. Under the New York statute of distributions she would be entitled in case of intestacy to the entire personal estate, and consequently to the amount represented by any invalid bequest. The heirs at law, besides this aunt, consist of more than fifty cousins and descendants of deceased cousins. The testator had known but few of these cousins and had seen very little of any of them. He had known little of his aunt and had not seen her for many years.

A contest arose upon the probate of the will, and the request made by the Editor of the *YALE LAW JOURNAL* for a statement of the questions involved can be best complied with by explaining quite fully the claim made in behalf of the contestant, Mrs. Brooks, and by quoting at some length from the opinion prepared by the writer in disposing of the case.

Section 2624 of the New York Code of Civil Procedure confers upon Surrogate's Courts power to determine the validity of testamentary gifts of personal property, but no such power exists as to devises. Should the title to the real estate ever be tested it must be in the Supreme Court by an action in ejectment brought by the heirs at law against the devisee. In case the bequests to Yale should be sustained by the higher courts, such decision will, although indirectly, effectually dispose of the validity of the devise, since the same principle would apply in the disposition of the real estate as in the case of the personal property. It was conceded upon the hearing that the will must be admitted to probate and letters testamentary issued. The single ground upon which the gifts to Yale University are assailed is that the will was executed less than two months be-

fore the death of testator. The statute which it is claimed is contravened is Section 6 of Chapter 319 of the Laws of 1848. The Act is entitled, "An Act for the incorporation of benevolent, charitable, scientific and missionary societies." The law provided that societies formed thereunder might take property by gift or will. The closing paragraph of Section 6 directs that "no devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."

The case of *Hollis v. Drew Theological Seminary and The Wesleyan University*, 95 N. Y. 166, decided in 1884, was relied upon by both parties to the controversy. The will was executed less than two months before testator's death, and contained bequests to the two defendants named, one a New Jersey, the other a Connecticut corporation. The opinion was written by Judge Earl. Stated concisely, the case holds (*a*) that the two-months restriction contained in Section 6 applies only to corporations formed under the act of which the section forms a part, and cannot be extended to societies organized under other general laws or by special charters; (*b*) that the said section has no application whatever to corporations chartered by other States; (*c*) that bequests to foreign corporations for humanitarian purposes are not against public policy; and (*d*) that there is no public or legislative policy against bequests made within two months of death.

With respect to all these matters the decision was clear and unequivocal, but a single observation made by the learned Judge who wrote the opinion has been seized by the contestant and made the foundation of the present controversy. These are the words referred to: "*If there were a general law in this State that no bequest to any of such corporations should be valid, unless contained in a will made at least two months before the death of the testator, that would indicate a general public policy which the courts of this State would enforce against foreign corporations which might come into this State, although such a limitation was not imposed by the laws creating them.*"

Reference must now be made to certain recent legislation in this State, which the contestant insists marks a departure in the policy of our laws so radical that bequests made within two months must now be deemed as so opposed to public and legislative policy that the courts must enforce the restriction even against foreign corporations.

On the 27th day of April, 1892, the University Law was passed. This law, like the numerous other enactments which

have been prepared by the Statutory Revision Commission of this State, gathered together, with many additions and modifications, the laws which had been passed from time to time on this subject, and which were scattered through the statute books. In this way one comprehensive and harmonious statute took the place of a large number of imperfect laws and amendments, often difficult to find and in some measure conflicting. By the provisions of this law, sixty-six acts of the Legislature, passed in almost as many different years, besides considerable portions of the Revised Statutes, were repealed, the repealed portions having been so far as was desired reenacted in the new law. The statute defines the term "University" as meaning the University of the State of New York, and Section 24 of the act provides, "The institutions of the University shall include all institutions of higher education which are now or may hereafter be incorporated in this State."

On the 18th day of May, 1892, the General Corporation Law was enacted. As its name indicates, this law is general in character, classifying the different kinds of corporations, providing for the methods of formation, the limitation of powers, the acquisition of property, besides various other matters such as would naturally be included in a law of this description. Section 11 is in part as follows: "Grant of general powers. Every corporation as such has power, though not specified in the law under which it is incorporated: 3, to acquire by grant, gift, purchase, devise or bequest \* \* \* subject to such limitations as may be prescribed by law."

Among the kinds of corporations provided for by the general corporation law of 1892 are membership corporations; and in 1895 the Legislature, following out the scheme of the revision commission, passed the Membership Corporation Law. At the end of this act, as in the case of the other laws prepared by the commission, there is appended a schedule of laws repealed. This schedule includes 114 acts of the Legislature repealed in full and eighteen repealed in part. In the latter class is found the act hereinbefore referred to for the incorporation of benevolent, charitable, scientific and missionary societies, which is set down in its chronological order in the schedule as follows: "1848—Chapter 319. All except Section 6."

The claims advanced by counsel were to the effect that the repealing schedule of the Membership Corporation Law having preserved Section 6 of the Act of 1848, while repealing the rest of the law, this section is to be deemed as engrafted upon and

made a part of the law which thus saved it from repeal, and that the General Corporation Law of 1892, by providing that corporations formed under it might take by devise or bequest "subject to such limitations as may be provided by law" must now be construed as including Section 6 as among such "limitations." It was therefore claimed in behalf of contestant that the retention of Section 6 under the circumstances referred to marked so general a change in the legislative policy of the State that the prohibition against bequests made within two months of death must, in spite of the decision in *Hollis v. Drew Theological Seminary*, be extended to an educational institution chartered by another State. In order to render this claim of any force, it was further contended that all colleges, being non-stock corporations, are therefore under the classification of the General Corporation law, membership corporations, and are to be classed among the corporations provided for by the Membership Corporation Law of 1895. The claim was distinctly made that Yale University is such an institution as, if organized under the laws of the State of New York, would be a membership corporation.

Stated more concisely, and condensed into a single proposition, the contestant sought to maintain that the recent legislation referred to, taken together, amounts to a general law that bequests to corporations of the kind provided for by the Act of 1848 shall be invalid unless contained in a will made more than two months before death, and that the courts in the enforcement of a supposed public policy must now apply the principle suggested in the italicized quotation from the *Hollis* case, and extend the prohibition to foreign corporations of the same class.

Discussing the main proposition advanced by contestant, the opinion states:

"The proposition that Section 6 has become 'a part of the Membership Corporation Act' and has acquired added force by the manner of its retention and by virtue of the repeal of the remainder of the Act of 1848, is vital to the contention made by the contestant, for it is only upon this theory that the force of the decision in *Hollis v. Drew* can be met or overcome. I am wholly unable to discover any reason or authority for the claim that this section is to be given any different force or effect under or by reason of the circumstances of its repeal, than it would have been entitled to had a separate and distinct law been enacted for the sole purpose of repealing Chapter 319 of the Laws of 1848, excepting Section 6. The doctrine is new and surprising that where an act of the Legislature is all repealed

except one section, such section becomes by virtue of the exception a constituent part of the repealing law, or obtains any new or different force or effect by reason of the obliteration of the sections which had formed part of the original act. The learned counsel for the contestant in a brief evincing the greatest labor and research, wholly fails to cite a decision or authority promulgating or suggesting any such doctrine or containing an intimation that such has ever been recognized as the law.

"On the other hand, how obvious is the purpose for the retention of Section 6. A large number of societies had been organized under this act during the course of forty-seven years. All were subject to the provisions against the validity of bequests made within two months of death. No good reason seemed to exist why these societies should be relieved from the restriction, which by the very terms of their organization had been assented to. Section 6 begins with the words, 'Any corporation formed under this Act.' The 'Act' having been repealed and the section left, as counsel for proponents describes it, 'floating and unattached,' it might be said to have no meaning and its retention to serve no purpose, except for the fact that the opening words of the section put the investigator to the inquiry as to what act is referred to, and his research is at once rewarded by the discovery that it is an act for the formation of benevolent, charitable, scientific and missionary societies. It would be further discovered that the section which had been saved from repeal, by its express words referred to corporations which could no longer be formed because of the repeal, and the one natural and logical reason which would be assigned for its retention, the one possible office to be fulfilled by it, would be to continue in force the restrictions which it contained as applied to corporations already formed under the act. The repeal of the law did not repeal the societies to which it had given birth, it simply prevented the organization of any more corporations under the law, and the preservation of the restrictive section simply held the societies already organized to the basis upon which they were originally formed."

The opinion cites *Endlich* on the interpretation of statutes; *Bank for Savings*, 3 Wallace, U. S. 495-513; and *Ex parte Crow Dog*, 109 U. S. 556-561, with the following comment:

"There is the highest authority for the doctrine that for the purpose of determining what force shall be given to portions of a statute excepted from repeal, resort should be had to the act itself as it stood at the time of the repeal, and the doctrine is of

the utmost value in the decision of this case, and in meeting, as it seems to me it does, the arguments made in behalf of contestant."

The opinion seeks to controvert the claim that Yale is an institution analogous to a membership corporation as defined by the Act of 1895. A portion of the discussion is here given:

"As I have already shown, even before the enactment of the General Corporation Law, the University Law had been passed, providing a comprehensive scheme for the formation and government of colleges and universities, and directing in explicit terms how all such institutions should be incorporated, by methods wholly outside the General or Membership Corporation Laws. The University Law was the work of the revision commission, and it seems apparent that having by the Act of April 27, 1892, provided a complete system for the incorporation of colleges and universities, it was not intended by the later Act of 1895 to include such institutions of learning along with societies so wholly different in character as those provided for by the Membership Corporation Law."

Upon the argument, counsel for Yale entered into an elaborate and learned discussion for the purpose of demonstrating that Yale was not such an institution as could at any time have been formed in this State under the Act of 1848. While in the main coinciding with this view, the opinion disclaims any intention to base the decision on this ground:

"It may well be doubted whether with the complete and harmonious system of law in this State for the formation of educational institutions and the stringent power of supervision which the law places in the hands of the Regents of the University, the Legislature ever intended that there should be in existence at the same time another law under which similar institutions might be formed free from these restrictions, and at liberty to confer degrees and award diplomas upon such terms and subject to such regulations only as the institutions might see fit to impose. It is sufficient to say that Yale University is not a domestic corporation; it was not incorporated under the Act of 1848; there is no public or legislative policy against bequests made within two months of death; Yale is not within the scope of the statute prohibiting such bequests; Section 6 has no greater force than before the repeal of the other sections of the same law; the phrase used in the General Corporation Act, 'subject to such limitations as may be prescribed by law,' has no application to this case. It would only add another column

to the structure if it were to be said, as counsel for the university claim, that purely educational institutions were never intended to be incorporated and in no single instance have been incorporated under the Act of 1848. However strong the argument of counsel, and however correct their conclusions, I do not deem it best to base my decision on this ground."

The case of *Vanderpoel v. Gorman*, 140 N. Y. 563, discussed in the opinion, is of much interest, both on account of its direct bearing upon the question at issue, and as impairing the force and effect which should be given to the italicized quotation from the *Hollis* case in the attempt to apply it to the present controversy. The *Vanderpoel* case decides that the New York statute prohibiting transfers or assignments of property by corporations in contemplation of insolvency cannot be applied to a foreign corporation doing business in this State.

Although not discussed by counsel the court called attention to the fact that since the enactment of the Membership Corporation law of 1895, that being the law, as contended by counsel, which evinced a changed legislative policy with respect to bequests made within two months of death, the Legislature has by special charter incorporated several societies of the kind provided for by the Act of 1848, authorizing these societies to take by bequest without restriction and in two instances has by amendment removed restrictions which in effect prohibited such bequests. Commenting on these recent statutes the opinion states:

"These recent acts of the Legislature answer more fully than any mere argument could do, the claim that it is now contrary to public policy to permit gifts to corporations when made by will executed within the two-months limit. Surely 'that cannot be enforced as public policy by the courts which the Legislature one day prohibits, in some cases, and another day permits in other cases.' "

The opinion concludes:

"I have not attempted to discuss this case in every aspect presented by the learned counsel for the contestant in his very able brief and oral argument. To have done so would have been to write a treatise, and yet that would afford no reason why the discussion should not be had if the case required it. The issue, after all, is one of statutory construction and may be confined within narrow limits. The decision which has been reached seems to me the only one which can be rendered with due regard to legal principles and without attributing to the Legislature

and the revisers a disposition to render complex and uncertain that which could as easily have been placed beyond controversy. I am fully satisfied that there has been no change in the legislative policy of this State with reference to the matters which have been discussed in this opinion, certainly none adding to the restrictions imposed upon charitable or educational bequests. I believe the purpose in retaining Section 6 of the Act of 1848 was as has here been pointed out, and that should the time ever come when the Legislature shall see fit to further prohibit bequests made shortly before death, and to extend that prohibition to foreign corporations, it will not be done by complicated, tortuous, ambiguous and uncertain methods, but rather by direct and clear statutory provision."

An appeal is to be taken from the decision. Should affirmance follow, counsel for the contestant make the statement that they will then avail themselves of the provisions of Section 2653a of the Code of Civil Procedure. This section provides that the validity of the probate of a will may be determined in an action in the Supreme Court for the county in which such probate was had. All heirs at law and next of kin and all interested persons, including the executors, must be made parties. The issue to be tried is confined to the question whether the writing is the last will and testament of the testator. This issue is tried by a jury, and the statute provides that the verdict shall be conclusive as to real and personal property, unless a new trial be granted or the judgment thereon be vacated or reversed. It will be seen that this is not an appeal or in the nature of an appeal from the decision in Surrogate's Court, but a new and independent action resorted to, ordinarily, for the purpose of procuring the verdict of a jury on the questions of testamentary capacity and undue influence.

*Safford E. North.*

BATAVIA, N. Y., February 22, 1898.



## LYNCHING: ITS CAUSE AND CURE.

## TOWNSEND PRIZE ORATION.

Lynch law is not of mushroom growth. It is older than our government. The necessity which compelled its birth is to be deplored not alone by America. Great Britain left to us this heritage of unreason, which we, alas! have failed to alienate. Ireland saw this abuse of legal form as early as 1493, when the Mayor of Galway, incensed at the "law's delays," hung his own son—a murderer—from the window of his home, declaring that "justice must be done."

The necessity which gave it birth in Ireland has contributed to its growth in America. The child of expediency has now become the despot of our civilization, unregardful of legal form, relentless in his decrees, untaught by mercy, intolerant and without conscience. Lynch law is now the rule, and legal form the exception. We blush with shame and tremble for the safety of our institutions when we recount that the ratio of legal executions as compared with death by lynching is as one to two.

Extraordinary causes must have produced this result. What are those causes? England has long since forgotten the one instance in which justice was dethroned; instances of almost daily recurrence speak straight to the American heart. In the Western States of the Union it was always a matter of expediency. Courts were few, travel was slow and "licensed" justices were ignorant. A crime was committed and the punishment was sure. The aid of the courts was seldom, if ever, invoked. In the South we behold an array of circumstances entirely dissimilar. Until within recent years lynchings were of infrequent occurrence there. At present the South and lynch law are synonymous. Prior to the civil war the crime which it punishes was unknown there, and practically impossible. But the times have changed. "Most of the men who were masters and most of the men who were slaves are dead." Emancipation came, and with it the political trickster of the North—ambitious for political spoils—to tell the negro that he was free; to fail to tell him that even liberty must have its restraints. The negro became part of the fabric of the government. The ballot was placed in his hand ere he was ready to receive it. Ignorance born of the darkness of slave-time stalked through legislative halls and usurped the judicial ermine. The one-time

chattel with hands unbound but with mind still fettered, became the white man's political peer—nay, his superior. The white man saw in the negro the destroying instrument of his political dominance. Hate, urged by fear, was the inevitable result. Prejudice came to make children out of men. What was by law a crime came to be regarded as a political duty—the duty of self-defense. A sentiment was thus created which became stronger than a regard for law when the victim against whom it was directed was the object of its hate. Can the white man be blamed? Was he wrong? One thing is sure, he was not less than human. No other country has ever been confronted with such a situation. Two ethnologically distinct peoples with equal liberties cannot, for long, exist in the same territory without racial conflicts. It generates a reciprocal hate. The white man's hate is dormant; it is not aggressive; it is called into action by the commission of some crime which makes fathers tremble for the sanctity of their firesides. Reason for the time is dethroned and the victim of such insanity is straightway arraigned before relentless "Judge Lynch," at whose forum is heard only the testimony of excited passion and unlistening prejudice. The reasonable-doubt doctrine is entirely set aside, and the victim meets his death, often without being heard in his own defense. It is true that few are ever lynched who would not have met death had the law been strictly enforced. That argument admits the outrage of the law.

It is argued that the crime of lynching is excused by the provocation, and the provocation was the commission of another crime. One crime never excuses another. "No kind or degree of provocation will ever justify or even mitigate it. It is barbaric, anarchic and wrong *per se*." The brief and bloody code of lynch law translated into plain English is this: "*Let past crime be met with present crime in order that future crime may be prevented*"—the worst fallacy that can mislead one man or many. That sentiment once instilled is the Greek horse admitted into the citadel of American liberties and sovereignties. No society can withstand the onslaught of such unreason; no rational mind can keep terms with such delusion. It is folly—folly taught by thoughtlessness. It is vengeance seeking whom it may devour. Vengeance begets vengeance, and crime does not deter crime. The crime which lynching punishes—the crime for which Tarquin fled the Imperial City—goes hand in hand with lynching. As one increases so does the other increase.

In 1890 there were 127 victims who met their death at the hand of riotous mobs; two years later there were 235. These figures are of fearful significance—significance which lies not so much in the first violation of the law as in the sentiment which it engenders. All good men deplore, but few are loud in their condemnation. Negroes in the South have been known to assist in lynching men of their own race. The disease is contagious; it feeds on human hearts and dulls the sensibilities of right and wrong. The father acts before the child; the child sees, and becoming a man, transmits it by example to his children. Time crystallizes this sentiment, and through it the people lose "the true perspective of civilization."

The remedy is not to be found in legislation. It is not to be found in placing laws upon our statute books which will never be enforced. Our laws from time immemorial have provided against murder. Lynching is murder, though divided among a million. Legislation could only punish; it could never prevent. If it is to cease it must cease entirely and absolutely. It is a disease each germ of which is dangerous to civilization. It is anarchy and America must not permit anarchy, no matter in what form fashioned. It cannot be tolerated, and that which cannot be tolerated lies with the people to say when and how it shall be put down. If there is law against it, let that law be enforced. The Chicago riots met with the public condemnation of all good men. Lynching, another form of anarchy, meets with the public condemnation of all good men. No one can indict the whole people of any section as approving of lynch law. Where the crime is most flagrant it is most strongly condemned. Those who view it in its fullest horrors are those who are powerless to prevent it. And yet the prevention must be applied where the evil exists. The North cannot mould the sentiment of the South. It has been tried and all efforts have been futile. Were the columns of their journals less tinctured with bitterness, and their criticism a little less unkind, their suggestions would be more fruitful in good results. The South must work out its own salvation.

The true remedy is in education—an education exerting a two-fold influence. All things come by education or the want of it. Lynching is the result of long years of schooling in the practice. If we would see a cessation of mob rule we must unteach those who engage in it. If we would unteach them we must so mould public sentiment as to make it evident that good men will not stand behind bad men, and that good men are in

the majority. Good men will not stand by and permit practices which violate the fundamental principles of society. No army was ever stronger than public opinion and no law was ever more efficacious. There are good men in the South—the South is full of good men, and in their hearts must lodge a sentiment against the abuse and neglect of law. If their teaching has been unsound they must be untaught. They must forget the precedents which sustain their action, and must learn that their institutions will perish unless they recognize the principle of obedience to the law. And the negro must be taught the inevitable consequences of his own wrong-doing. He must realize that punishment will follow sin so sure as the night the day. He must feel that the law will fail to protect him when he heeds not the law's admonitions.

A change is coming, slowly, perhaps, but surely. The Southern people, with their Governors, are taking an united stand against the abuse and neglect of law. The lyncher is being placed on the plane of the lynched, and the righteous indignation of public sentiment is dealing with them both. There will be but one law, and that law will be administered. The ancient Themis will no longer rush disgraced and dismantled from the scene of her late dethronement. The black man will seek and not in vain that impartial trial which no grade of crime can deny him. This sentiment will live and grow and become mighty, and through it, and by it, the law will still preserve its majesty and Justice will be no longer ousted of her jurisdiction.

*Joseph Edwin Proffit.*

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THERE are two extreme views of the responsibility of the Spanish Government in the matter of the *Maine* in case the accident-on-board theory proves untenable. The one holds that when a ship of war of one country enters another's port that other *guarantees* its safety from external dangers. The other maintains that under similar circumstances the actual complicity of the government must be proved to attach liability to it. Neither of these views seem to us to be warranted. Examine them a moment. The first view is probably based upon a mistaken understanding of such cases as that of the U. S. privateer *General Armstrong* in the harbor of Fayal in 1814. An English boat expedition tried to cut her out. Her crew defended themselves for a time, then set fire to the ship and took refuge on shore. When claim for her value was made upon Portugal, whose jurisdiction had been violated by the attack, it was contested and finally referred to arbitration. The award declared that protection had been due from the Portuguese Government, but that since the crew had defended itself instead of appealing to the authorities the latter were freed from further responsibility. But to argue that because protection is due in a friendly port against belligerent attack, therefore, protection is *guaranteed* against *all* attack, is to confuse between an act which openly violates neutrality, sovereignty and international law, and an act which may be a skillfully devised and secret evasion of the local police regulations. In the one case the attack is twofold, upon a friend's sovereignty as well as upon an enemy's ship within that friend's jurisdiction. For its own sake as well as for its visitor's sake resistance to open attack is due.

In the other case, with all the good will in the world, and with efficient harbor policing, it may not be possible to stop all secret machinations. Why should a state *guarantee* a degree of protection which neither it nor any other power has the ability to make absolutely effective. It is the duty of the United States to prevent filibustering, but it does not guarantee that it will be invariably successful. It uses those measures which appear adequate for the purpose and denies further responsibility.

Now take the other view, that the Spanish Government has no liability except for the acts of its authorized agents. This is as much too lax a theory as the other is drastic. A government owes good faith, fair treatment, a desire to protect, as well as the mere order that its own servants shall keep their hands off. Its duties are not merely negative. They are positive. Its duty lies partly in controlling other agencies than its own official agencies and a corresponding responsibility attaches. Otherwise through mere negligence a hostile-minded power could accomplish its ends and yet claim exemption from responsibility. A man is responsible for the acts of a savage dog which he owns, even when he does not himself set the animal on. If we pursue this analogy a step farther it will bring us to the middle ground where we conceive the law and justice of this question really lie. Suppose the dog in question is not savage; has never bitten a man before, but being under considerable mental excitement suddenly takes it into his head to commit a breach of the peace. If the animal's master has had no reason to suspect an outbreak we do not blame him for not having chained the dog up. To found a suit for damages negligence must be shown, and a jury will be asked to pass upon the question.

So is it in judging Spain's responsibility for the loss of the *Maine*. Neither an accident on board nor an outside attack resulting from the orders of the government, would present any legal question. Between these limits of undoubted responsibility lies a middle ground. We deny on the one hand that Spain can be held to have guaranteed the safety of the *Maine* within her waters; we deny on the other hand that Spain owed our ship nothing more than the abstention of her own officers from doing it an injury. We assert that the right rule is that Spain owed care and thought and good judgment and the use of her ordinary, or, if necessary, of extraordinary, agencies; in a word, owed *due diligence*, to secure the safety of the visiting man-of-war.

What is due diligence? What sort of diligence was due under the circumstances of this case? Is not this a fair question for a jury for arbitration? But generally speaking, *due* diligence would be that which was proportioned to a reasonable suspicion of risk, and to the results to be looked for from a failure to be diligent.

An illustration will better explain what we mean. The relations between the two countries were somewhat strained when the *Maine* steamed into Havana harbor. There her berth was assigned her by the harbor master. If he was permitted or directed by the officials in charge to place the ship over a mine, thus making the explosion at the hands of some unauthorized, irresponsible fanatic at least possible, it was a failure of *due* diligence. So if the Government became aware of a hostile feeling and movement amongst any class in Havana, directed against the *Maine* or the Americans, it was bound to more than ordinary care to protect it and them. When the *Viscaya* came to our own port during a very excited condition of the public mind and temper a greater degree of diligence was due for her protection than in the case of the *Maine*, and great diligence was shown.

It may well be that the Board of Inquiry will be unable to assign a cause, or fix the blame, for the explosion. In that case, if the principle we have laid down is sound, the Spanish Government can only be held responsible in damages if it be shown to have failed to exhibit due diligence in providing for the *Maine's* safety.

T. S. W.

## COMMENT.

A very important decision showing the opinion of the court of last resort of that circuit has been recently handed down by the United States Circuit Court of Appeals in the case of *Hopkins et al. v. Oxley Slave Co.*, 83 Fed. Rep. 912. Although not unanimous, it is of great value in deciding that question, which is nearly always the basis of the action of conspiracy and concerning which the courts are hopelessly in conflict, whether an act lawful for an individual can become a conspiracy when done by several. The plaintiff below was a corporation engaged in the manufacture of casks and barrels, used mainly to pack flour, meat or provisions in. Some of their product was hooped by hand, while an automatic hooping machine was used upon the remainder, thereby greatly decreasing the cost. The defendants were several private persons and two labor associations, having branches throughout the United States and Europe; who demanded that the corporation cease the use of such hooping machine, and gave notice that if their request was not acceded to they would immediately notify the company's customers not to buy barrels so hooped, and would induce the members of all labor organizations throughout the country not to purchase provisions or other commodities packed in such barrels. To prevent such notification an injunction was prayed for, it being claimed that the damages otherwise resulting would be irreparable. Two of the cases mainly relied upon by the defendants—*Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, and *Continental Ins. Co. v. Board of Fire Underwriters of the Pacific*, 67 Fed. Rep. 310—were simply cases of lawful competition in trade. The third case brought forward was *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; 55 N. W. 1119, in which it was decided that members of an association might voluntarily refuse to purchase from whomsoever they will, and in commenting thereon this court said: "We are not able to concede, however, that it is always the case that what one person may do without rendering himself liable to an action many persons may enter into a combination to do. It has been held in several well-considered cases that the law will sometimes take cognizance of acts done by a combination which would not give rise to a cause of action if committed by a single individual, since there is a power in numbers, when acting in concert, to inflict injury, which does not reside in persons acting separately. But if we concede that the reasoning employed in *Mfg. Co. v. Hollis* was sound, as applied to the facts in that case, yet it by no means follows that the members of the association would have had the power to combine for the purpose of compelling other persons, not members of the associa-



tion, to withhold their patronage from a wholesale dealer who failed to conduct his business in the mode prescribed by the association."

The dissenting opinion of Judge Caldwell, while very strong, loses much of its force from his failure to see that although the defendants had no intention of resorting to personal violence, they nevertheless, quoting from Judge Thayer, expected, "By concerted action, force of numbers, and by exciting the fears of the timid, to compel many persons to surrender their freedom of action and submit to the dictation of others in the management of their private business affairs." Also the public would thereby be deprived of the use of a valuable invention.

We are indebted to Judge Townsend of the United States District Court for Connecticut for his decision (not yet reported) in *U. S. v. Iselin & Co.* The question at issue was whether the law will regard fractions of a day when it is necessary in order to determine conflicting rights. The Dingley tariff law was signed by President McKinley at six minutes past four on July 24, 1897. The steamship *Paris* landed at her dock in the forenoon and these importations were entered for consumption before 4 o'clock of that same day. The Collector assessed the import duties and an additional duty for undervaluation according to the provisions of this Dingley law, while the importers claimed that the goods should be assessed according to the lower rates under the old Wilson law. The opinion of Judge Townsend relies entirely upon the decision of the United States General Appraisers, who (Henderson M. Somerville giving the decision) decide the question principally upon two grounds. The different sections of the act in referring to the time when duties shall be levied, etc., use the phrases, "on and after the passage of this act," or "on and after the day when this act shall go into effect"; and the section repealing existing laws provides that the repeal "shall not affect any act done, or any right accruing or accrued \* \* \* before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modification had not been made." There can be no question from the first two phrases that the law took effect on the day of its approval by the President (*Arnold v. U. S.*, 9 Cranch. 104), and, according to the old common law rule that fractions of a day are not recognized, from the earliest moment of that day. But so long ago as Lord Mansfield's time, in *Combe v. Pitt*, 3 Burr. R. 1423, 1434, it was said, "though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish." And in *Louisville v. Savings Bank*, 104 U. S. 469, 478, Justice Harlan says, "it can not be doubted that the Court may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the Executive." Furthermore, the Constitution of the United States,

Article I., Section 7, provides that "Every bill shall take effect as a law from the time of its approval by the President;" and Judge Story *In re Richardson*, 2 Story 571, 580, said in construing this clause: "It is the act of approval which makes it a law, and, until that act is done, it is not a law, \* \* \* for the general rule is, *Lex prospicit, non respicit*. The law prescribes a rule for the future, not for the past." The general principle may therefore be stated as follows: That where there is no necessity to look into the fractions of a day the old rule will be applied of relation back to the earliest moment of the day (*U. S. v. Norton*, 97 U. S. 164); but where special circumstances render it necessary to regard the exact moments of time when two acts were done in order to adjust conflicting rights arising thereunder, then the old rule will be disregarded and courts will admit evidence to show which had priority in point of fact (*Burgess v. Salmon*, 97 U. S. 381, where an act increasing the internal revenue tax on tobacco but providing that the increase should "not apply to tobacco on which the tax under existing laws shall have been paid when this act takes effect," was held not to apply to tobacco, the tax on which had been paid the same day the act was signed, but a few hours before). The second ground was that the section providing for an additional duty, where the appraised value exceeds the value declared in the entry, must be judicially construed as penal and therefore cannot be considered as retroactive even for one moment. And as Judge Hughes in *Hancock v. Burgess*, 1 Hughes 356, said: "If, as to its penal features, it cannot be held to have gone into effect until 9 P. M. of the day of its enactment, neither can it be held to have gone into effect before that hour as to its other provisions."

We are also indebted to Judge Townsend for his decision (as yet unreported) in *Morris Express Co. v. U. S.*, where, against the testimony of St. Gaudens, J. Q. A. Ward and other distinguished sculptors, he decides that a tomb and reredos of dressed stone imported for presentation to a church in Binghamton, N. Y., is a "work of art" within the meaning of the tariff law admitting such free. It is exceedingly difficult to draw any line as to what is and what is not a "work of art," for what appeals to one person's emotions and sense of the beautiful may not to another's. St. Gaudens defined a "work of art" as understood by artists to be only such a work as "is produced by a professional artist in his own studio, either wholly by himself or with such assistance as he needs, under his own immediate direction and supervision." But all the sculptors admitted that if this was not a work of art in sculpture it was a work of art in architecture—in the broad sense, and in interpreting tariff acts, words are "to be understood in the sense which they bear in the common speech of the people." In this sense the altar and reredos must be considered a "work of art"; it is "a skillful production of the beautiful in visible

form." To hold that architectural works are not works of art would exclude the famous churches and towers of Europe, the fountains of Paris and Versailles.

It would seem in these more enlightened and refined days as if any attempt to track criminals by bloodhounds or, at least, to convict them by the testimony of bloodhounds, would be frowned upon by Courts of Justice. But the Courts of Alabama have admitted such testimony (*Hodge v. State*, 13 South. 385, and *Simpson v. State*, 20 South. 573), and in *Pedigo v. Commonwealth*, 44 S. W. 143, the Supreme Court of Kentucky would have admitted the testimony if certain instructions had been complied with. These instructions were laid down as follows: That it must be established by the testimony of some person who has personal knowledge of the fact, that this particular dog has "acuteness of scent and power of discrimination," and "has been trained or tested in the tracking of human beings," and that the dog "was laid on the trail, whether visible or not, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him." Apparently the court considers it in the nature of expert testimony. But Judge Guffy very strongly dissents and, according to our views, with all the weight of principle on his side. He shows that the only cases in which such testimony is at all reliable are those where the dog is set to track some *known* fugitive or criminal, as a runaway slave, or a particular person accused of crime. But when the dog is set to ferret out the *unknown* guilty man from all the neighborhood (as here), how can it be shown that the trail he picks up is that of the criminal, even granting that he is started at a point where the circumstances tend clearly to show that the guilty party had been? If the point is on a highway, how many others may have passed there since the crime? If not, in order to obviate the possibility of the dog's following the wrong trail, must it not first be shown that no one else has been near there since the crime? The dog and not the person on the stand testifying to the acts of the dog, is the real witness, and he can not be cross-examined. It is really hearsay evidence—A is permitted to testify to what B (the dog) told him.

## RECENT CASES.

## CONTRACTS.

*Contracts of Married Women—Conflict of Laws—Following State Decisions.—First Nat. Bank of Chicago, Ill., v. Mitchell*, 84 Fed. Rep. 90. Defendant, a married woman and resident of Connecticut, at the request of her husband, a member of a co-partnership doing business at Chicago, signed a guaranty which was dated at Chicago, and which had previously been signed by the members of the husband's firm there. The guaranty having been delivered to plaintiff at Chicago, defendant afterwards made an assignment in insolvency, and plaintiff presented his claim against her estate. The Supreme Court of Connecticut having decided that the claim should not be allowed, on the ground that the contract was a Connecticut contract, and invalid under the law of that State for want of capacity of defendant to make it; *held*, in an action against her on the guaranty, that this decision will be followed by the Federal court. But see *Milliken v. Pratt*, 125 Mass. 375; and *Bell v. Packard*, 69 Me. 105, where, however, the court was evidently influenced by the fact that in both cases the wife could have legally made the contract in the State of her residence. See also *Bowles v. Field*, 78 Fed. 742. The capacity of citizens of a State, so long as they remain within the State, would seem to be a matter of local law, to be controlled by the laws of the State, and not to be evaded by the simple device of sending or mailing a letter to some other State.

*Insurance—Tower's Liability—Collision.—Newton Creek Towing Co. v. Aetna Ins. Co.*, 48 N. Y. Supp. 927. A contract of insurance, termed "tower's liability," indemnified the owner of a tug-boat against any loss or damages occasioned a vessel in tow from "any accident caused by collision." *Held*, that in admiralty the term "collision" should be given a broader and more comprehensive import than its strict nautical or legal acceptation, and that it was broad enough to cover an injury done to a vessel by sudden contact with a block of ice, while, in accordance with an established local custom, it was being towed through an ice floe.

*Street Railways—Regulations as to Passengers—Standing on Platforms—Expulsion of Sick Passenger.—Montgomery v. Buffalo Ry. Co.*, 48 N. Y. Supp. 849. A regulation of a street car company, forbidding passengers from standing on the rear platform, *held* to be reasonable and proper, and that the conductor of the car was justified thereunder in expelling a passenger who was suffering from nausea and was riding on the platform that he might relieve himself. Green and Brown, J. J., (dissenting), *held* that, while the rule itself might be reasonable, it should be reasonably enforced; that the paramount object of such a rule is the protection of the company from liability for injury to the passenger, and incidentally the convenience of passengers in entering and leaving the car; that the company's responsibility was relieved against by plaintiff's actions, and there being no other inconvenience or annoyance occasioned, there was no real necessity for the expulsion, and that it was therefore unreasonable.

*Contract—Conditions Precedent.*—*Stevens et al. v. Ambler*, 23 S. W. Rep. (Fla.) 10. Defendant contracted to pay plaintiff \$5,000 provided it would extend its railroad to Section 35. *Held*, that the fact that the railroad extended its line to within 500 feet of said section did not constitute a fulfillment of the condition precedent. Such contracts must be strictly complied with. *Martin v. Railroad*, 9 Fla. 370. The meaning of the word "to" is not satisfied unless the point or object be actually attained. *Moran v. Lesotte*, 54 Mich. 83, 19 N. W. Rep. 757.

*Contracts—Construction—Provisions—Validity—Personal Liberty.*—*Dittrich v. Gobey*, 51 Pac. Rep. (Col.) 962. Defendant, formerly the husband of plaintiff, contracted with the latter to restore their daughter to her upon her becoming 18 years old, under penalty of \$1,000 as liquidated damages. The child, upon reaching the age of 18, refused to go with her mother (having reached the age of majority) and her father refused to compel her. Plaintiff sued for damages. *Held*, the child having reached her majority, her personal liberty could not be restrained and that there was not sufficient ground for the view that the contract was alternative, allowing the father to either restore the child or pay \$1,000.

*Receiver—Breach of Contract.*—*Levy v. Tatum*, 43 S. W. Rep. (Tex.) 940. A woman, owning land through which a railroad company had built its road without condemnation, deeded to the company the ground for its right of way and also for a depot, on conditions that the railway company bind itself and assigns forever to maintain a depot in that place as long as the railway remained in operation. *Held*, that there was a cause of action against the receiver of said road for discontinuance of said depot, notwithstanding he had been so ordered by the court.

*Divorce—Grounds—Cruelty.*—*Duberstein v. Duberstein*, 49 N. E. Rep. (Ill.) 316. *Held*, in an action by a husband for divorce from his wife, that the use of violent and abusive language or threats, constitutes of itself no sufficient ground for divorce. But see, as to sustaining a decree for separation in favor of the wife on such grounds, *Fitzpatrick v. Fitzpatrick*, 47 N. Y. Supp. 737, YALE LAW JOURNAL, Vol. VII, No. 4, p. 189.

*Broker—Commission—Defects of Title.*—*Berg v. San Antonio St. Ry Co.*, 43 S. W. Rep. (Tex.) 929. Plaintiff, a broker, was employed to sell bonds for defendant, who, he supposed, had a good title. In negotiating the sale he signed a contract with the purchaser, providing that the title should be satisfactory. *Held*, that the fact that the broker signed the above contract was not a recognition of a defect in his principal's title which would prevent a recovery of his commission, where the sale fell through because of such defect.

## EVIDENCE.

*Contract—Construction—Parol Evidence—First Nat. Bank of Hailey & Beers*, 51 Pac. Rep. (Idaho) 777. Mortgagors signed a contract by which they agreed to turn over the mortgaged property to the mortgagees, on condition that the latter apply all rents and profits in leasing it to the actual expenses, taxes, insurance and interest and principal of the mortgage note. The mortgagees, at the same time, signed a similar agreement, save that no mention was made of insurance. The mortgagees failing to insure, and the property

burning down, it was *held*, that the two agreements taken together could not be considered as a single contract by which the mortgagees bound themselves to insure. Parol evidence is inadmissible to supply an omission in the second agreement.

*Evidence of Adverse Possession—Acknowledgment of Title Paramount.*—*Oldig v. Fisk*, 73 N. W. Rep. (Neb.) 661. The adverse holder of land, before the statute had run, having completed his title, voluntarily offered and attempted to purchase the paramount title from the owner. *Held*, that the attempted purchase was not alone sufficient to divest the possession of its adverse character, although the adverse claimant may have intended thereby to acquire the true title. Such an attempted purchase is not an acknowledgment of the superiority of the outstanding title, nor an abandonment of one's former claim. It is proof only that the occupant thinks it worth while to get rid of the outstanding title and unite it to the one under which he has been holding. *Jackson v. Newton*, 18 Johns. 355; *Northrop v. Wright*, 7 Hill 476, and other cases cited upholding these views. Ragan, C., (dissenting), held the general rule to be that any act of recognition or acknowledgment of a superior title in another, during the period of adverse possession, will amount to an interruption of continuity of possession, and defeat the operation of the statute. 1 Am. and Eng. Enc. Law (2 Ed.), 838. "The offer is a recognition of the owner's title, and will stop the running of the statute." *Lovell v. Frost*, 44 Cal. 471. An offer by one to purchase the property which he is holding adversely, from the owner, within the statutory time, is a clear recognition of plaintiff's title, and will interrupt the running of the statute. *Litchfield v. Sewell* (Iowa), 66 N. W. 104.

*Evidence—Admissibility—Memorandum Made by Third Party—Competency of Wife as a Witness.*—*Pingree v. Johnson*, 39 Atl. (Vt.) 202. In an action for balance of account, where defendant alleged certain payments made by his wife and under his direction to have been received as full settlement, his testimony cannot be corroborated by a memorandum made by his wife at the time. Nor is his wife, under a statute permitting a wife to testify as to transaction done by her as her husband's agent, competent to testify as to an act done by her for her husband in his presence or under his direction. Such a transaction must be regarded as conducted by himself and not by an agent. *Bates v. Sabie*, 64 Vt. 511, 24 Atl. 1013.

#### EXTRAORDINARY WRITS.

*Quo Warranto—Judgment of Ouster.*—*State ex rel. Boyle, Atty. Gen. v. Mutual Life Ins. Co., of N. Y.*, 51 Pac. Rep. (Kan.) 881. Plaintiff brought an action of *quo warranto* against defendant for exercising in Kansas its corporate franchises, without having been authorized to do so by the laws of the State. To this the defendant filed an answer and to the answer a reply was filed. The defendant then asked leave to withdraw its answer, alleging that it had ceased to transact insurance business in Kansas, and that it brought into court sufficient money to pay all the costs of the case and asked that the action thereupon be dismissed. *Held*, that judgment in favor of plaintiff, ousting the defendant from the exercise of incorporate powers within the State, was the proper decree, and not dismissal. Johnston, J., dissenting, held, that the corporation, having surrendered the privilege formerly exercised, the purpose of the proceeding had been fully accomplished and nothing was left for

trial, nor anything upon which to base a judgment of ouster. Dismissal was therefore the proper decree.

*Trade Labels—Fraudulent Use—Injunction—Suit by Trade Union.—Tracy v. Banker*, 49 N. E. Rep. (Mass.) 308. Under St. 1895, c. 462, § 3, entitled, "An act to protect manufacturers from the use of counterfeit labels and stamps," which extends to "any person, association or union;" *held*, that an unincorporated trade union may enjoin the unauthorized use and counterfeiting of a label it has adopted. This is contrary to the earlier decision of *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, where technical difficulties in the statute as it then stood precluded a recovery by plaintiff in a similar action. See *Hetterman et al. v. Powers et al.*, 43 S. W. Rep. (Ky.), 180; YALE LAW JOURNAL, vol. VII. No. 5, p. 239, and cases there cited *pro* and *con*.

#### PROCEDURE.

*Arguments to Jury—Reading Lawbooks.—Griebel v. Rochester Printing Co.*, 48 N. Y. Supp. 505. To permit counsel, in summing up a case, to read extracts from textbook and reports of cases to the jury, *held*, error, if objected to by opposing counsel and exceptions taken thereto. *Reich v. City of New York*, 12 Daly 72; *Bell v. McMaster*, 29 Hun. 272. See 1 Thomp. Trials, p. 720, tit. 4, c. 20, for a general discussion. The reading of such extracts is not relevant to a question of fact and may mislead the jury by inducing them to believe that such a thing is so as a matter of law.

*Libel and Slander—Libelous Pleading—Privileged Matter in Pleading—Relation to Issue.—Union Mut. Life Ins. Co. v. Thomas*, 83 Fed. Rep. 803. In an action by defendant against plaintiff insurance company to recover upon an insurance policy issued by the company on the life of defendant's husband, the company made answer denying the death of insured, and alleging as an affirmative defence that defendant and her attorneys had entered into an agreement and conspiracy to defraud plaintiff; that defendant and her attorneys had no knowledge of the death of the insured, but had alleged his death for the sole purpose of carrying out the conspiracy and fraud. *Held*, libel and slander. The American rule, contrary to the English, is that matter alleged in a pleading, in order to be privileged, must be at least so pertinent to the controversy that it may become the subject of inquiry during the course of the trial.

*Criminal Law—Appeal—Review.—People v. Helmer*, 49 N. E. Rep. (N. Y.) 249. *Held*, that the jurisdiction of the Court of Appeals is confined to the review of questions of law only, and no unanimous decision of the appellate division in a criminal case, not involving the death penalty, that there is evidence supporting or tending to sustain a verdict not directed by the court can be reviewed on appeal (Const., Art. 6, § 9). From this decision, O'Brien, J., vigorously dissents. He maintains that the question in the case—whether there is any evidence to sustain the verdict—has been considered as purely a question of law, ever since the decision of Lord Mansfield, in *Carpenter's Co. v. Haywood*, 1 Doug. 373. See also 1 Greenl. Ev., § 49; *Mason v. Lord*, 40 N. Y. 476. The limitations upon appeals to this court in Const., Art. 6, § 9, embrace three cases only; (1) judgments finally determining actions; (2) final orders in special proceedings; (3) orders granting new trials upon exceptions, where the appellant stipulates that judgment absolute may be rendered in case of affirm-

ance. These limitations, he argues, apply only to civil cases. The majority of the court were probably misled to construe them as applying to criminal cases, as well, from the fact that judgments of death are mentioned by way of exception. But this exception was clearly intended only to enable the court to continue to entertain appeals in capital cases, just as it had before.

## WILLS.

*Wills—Bequest for Celebration of Mass.—Harrison v. Brophy et al.*, 51 Pac. Rep. (Kan.) 883. In a will a residuary sum was bequeathed in the following language: "I give and bequeath to Rev. James Collins, for mass, for his grandfather's and grandmother's soul." The validity of the legacy was denied by the heirs on the ground that the will created a trust which was void for uncertainty of beneficiaries. *Held*, it was an absolute gift, imposing upon the conscience of the donor the duty of performing the service named.

*Wills—Construction—Equitable Conversion—Res Judicata—International Comity.—Appeal of Clark*, 39 Atl. Rep. (Conn.) 155. A will directed that the residue of the testatrix's estate be divided equally among her husband and children, "share and share alike, my husband and my children sharing *per capita*." The husband was to hold the children's shares in trust until each became twenty-five years of age, and then "to pay the whole sum over to" such child; but if the child should previously marry, one half of its share was to "be paid" on such marriage, "the other half" on becoming twenty-five years of age. *Held*, not to work an equitable conversion of lands of which testatrix died seised. A general residuary clause will not be given the effect of a conversion, unless a power of sale is clearly implied from the whole will. *Hobson v. Hale*, 95 N. Y. 588; *Hale v. Hale*, 125 Ill. 399. The courts of Connecticut are not required by international comity to adopt the construction of a will by a court of a foreign State as to whether the will marked a conversion of lands situated within the State, and of which the testatrix died seised. It would probably be otherwise if the question were not one directly involving the mode of passing title to lands in the State. *Rockwell v. Bradshaw*, 67 Conn. 814, 34 Atl. 758.

## MISCELLANEOUS.

*Intoxicating Liquors—Sales to Minors.—Bartman v. State*, 43 S. W. Rep. (Tex.) 984. *Held*, that one who delivers to a minor a glass of intoxicating liquor at the request of another, who pays for the same, is not guilty of the offense of selling or giving liquor to a minor.

*Dedication—Identity of Descriptions—Home for Care of the Inebriates v. City and County of San Francisco*. 51 Pac. Rep. (Cal.) 950. The city of San Francisco dedicated a certain lot owned by it to the public use, as a "Home of Inebriates." The legislature, later, in 1870, passed an act reading: "The title to the lot set apart by the Board of Supervisors of San Francisco, or a committee of said board, to and for the corporation known as the 'Home for the Care of the Inebriates,' is hereby confirmed to said corporation." The lot was not described in the act, was not set apart, nor was there such a corporation as the "Home for the Care of the Inebriates." *Held*, in an action to quiet title that no title had ever been acquired.



*Damages—Examination of Person of Plaintiff.*—*Belt Electric Line Co. v. Allen*, 44 S. W. Rep. (Ky.) 89. Plaintiff, in an action for damages for permanent injuries to his person may be required upon motion of defendant to submit to a surgical examination of his person by experts, where the examination may be made without danger to the plaintiff's life or health, and without the infliction of serious pain. The motion therefore is addressed to the sound discretion of the court; and the refusal of it in a proper case is ground for appeal. This decision, which appears to be the first upon the point in Kentucky, is in harmony with that of *Shroeder v. Chicago R. I. R. R. Co.*, 47 Ia. 375, and like cases (95 Mo. 189; 37 Ohio St. 104; 29 Kan. 776; 16 Neb. 578; 61 Wis. 536; 33 Min. 130; 72 Tex. 95; 90 Ala. 71). But it is contrary to the ruling in *R. R. Co. v. Botsford*, 11 Sup. Ct. 1000, followed by the supreme court of Indiana, in *Penn. Co. Newmeyer*, 28 N. E. 860, which reverses the earlier decisions in that State. Compare also *Parker v. Ensloe*, 102 Ill. 272; *McQuigan v. R. R. Co.*, 29 N. E. Rep. (N. Y.) 235. The New York code now embodies a provision allowing an examination in certain cases. For a recent decision in the latter State, granting a wife the right to demand such examination of her husband in a suit for divorce against him on the ground of impotency, although the code does not authorize it, see *Cahn v. Cahn*, 48 N. Y. Supp. 173.

*Eminent Domain—Mortgage Foreclosure—Rights of Purchaser.*—*Philadelphia, R. & N. E. R. R. Co. v. Bowman*, 48 N. Y. Supp. 901. The plaintiff railroad company, with the consent of the owner, entered upon and improved property by constructing its tracks thereon. At the time there was a mortgage on the property, a release of which was not obtained, nor were there any proceedings instituted to condemn the right of the mortgagee. The mortgage was subsequently foreclosed, and in an action by the railroad to condemn the interest of the purchaser at the foreclosure sale, it was held that the latter was entitled to compensation for the improvements placed on the land by the company. By the decree, and the sale thereunder, not only the land, but the fixtures and improvements thereon passed to the purchaser, for the value of which he was entitled to compensation (*Briggs v. Railroad Co.*, 56 Kan. 526).

*Customs Duties—Classification—Dredges and Scows.*—*The International et al., etc.*, 83 Fed. Rep. 840. Dredges and scows are vessels, and are not dutiable as "goods, wares and merchandise" under the tariff laws. The case is distinguished from *U. S. v. Dunbar* (14 C. C. A. 639), 67 Fed. 783, where the dredge was entered by its owner as an imported article, and the only question presented was as to the correctness of the ruling of the collector that it was not on that account exempt. See *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, cited in YALE LAW JOURNAL, Vol. VI., No. 5, p. 289.

*Interstate Commerce—Effect of Competition—Dissimilar Circumstances and Conditions.*—*Behlmer v. Louisville & N. R. R. Co. et al.*, 83 Fed. Rep. 898. Held, that competition between carriers subject to the Interstate Commerce Act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for short than for long hauls without an order to that effect from the commission, in accordance with the proviso of section four of the act. Morris, District Judge, dissenting, deems it erroneous to hold that the carriers could not justify themselves for such discrimination,

unless they had first applied to the commission. But the only case he cites to sustain his contention is *Interstate Commerce Com. v. Atchison, T. & S. F. R. R. Co.*, 50 Fed. 295. Since the decision in the present case, however, there has appeared the case of *Brewer et al. v. Central of Ga. Ry. Co. et al.*, 84 Fed. Rep. 258, which flatly contradicts the present decision, citing as exactly to the same view, *Interstate Commerce Com'n v. Alabama M. R. R. Co.*, 18 Sup. Ct. 45. In this last case are quoted the words of Judge Cooley in *In re Louisville & N. R. R. Co. v. Interstate Commerce Com'n*, 1 Interst. Commerce Com. R. 47. "if the carrier, without first obtaining an order for relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. \* \* \* Beyond question the carrier must judge for itself," etc.

*Patents—Infringement—Sale of Patented Articles Purchased Abroad—Dickerson v. Tinsling*, 84 Fed. 192. Dickerson was the assignee of a patent on phenacetine. Defendant purchased phenacetine in Germany, where it was not patented, imported and sold it in this country. *Held*, that such sale in this country was an infringement, whether he purchased the phenacetine in Germany from persons other than the owner of the U. S. patent or his vendees, or whether he purchased it from the owner of the U. S. patent with a condition marked on the article that it should not be imported into the U. S. See Vol. 7 YALE LAW JOURNAL, p. 233, for comment on analogous cases.

*Contempt—What Constitutes—Defence—Jurisdiction—Review—McClatchy v. Superior Court of Sacramento County*, 51 Pac. Rep. (Cal.) 696. The attention of a judge while sitting on a bench being drawn to a newspaper article descriptive of the proceedings of the day before, he pronounced them a gross fabrication. In a succeeding issue of the paper an editorial read as follows: "The *Bee* will not keep in its employ a reporter who garbles or mistakes, \* \* \* and it will not stand silently by while an aggregation of attorneys tries to make him out a liar and while a prejudicial and vindictive czar upon the bench aids and abets them in such a purpose." Thereupon the editor was charged with contempt and found guilty. On trial in lower court counsel sought to prove the truth of its publications, after evidence of their falsity in the shape of official court reports had been introduced by the prosecution, but was not permitted to do so. On a writ of certiorari it was *held*, that the court exceeded its power in refusing to admit such evidence. The publication of the truth as to legal proceedings is not a contempt of court (*In re Shortbridge*, 99 Cal. 526, 34 Pac. Rep. 227); and the criticisms of the action of the judge, if made only in proper response to an unjust charge against accused's veracity, and without intent to improperly influence the proceedings of the court would not be contemptuous. The action of the court constituted a denial of due process of law. Beatty, C. J., concurring, based his decision on the ground that the judge of the lower court, in denouncing the original report, was acting outside of his judicial capacity. Harrison, J., dissented on the ground that the action of the lower court, after obtaining jurisdiction to investigate the charge, was not a subject of review, and that the finding as to the facts, upon which it based its opinion, was final. Compare *State ex rel. Atty Gen. v. Court of Eau Claire County et al.*, YALE LAW JOURNAL, Vol. VII., No. 2, p. 278.

*Taxation—Property Subject—Life Insurance Policies—State Board of Tax Com'rs et al. v. Holliday et al.*, 49 N. E. Rep. (Ind.) 14. Const., Art. 10, § 1, requires the General Assembly to provide by law for uniform taxation, and prescribe such regulations as shall secure a just valuation for taxation of all property, except such as may be exempted by law. Sec. 3 of the tax law of 1891 (Rev. St. 1894, § 8410) provides that "all property in the State not expressly exempted shall be subject to taxation." Sec. 50 includes in the specification of what shall be embraced in the taxing schedule, "all other goods, chattels and personal property, not heretofore mentioned," except exempt property. In providing the form of schedule (Section 53) the words "credits," "demands," and "claims" are used. *Held*, that life insurance policies, while they may be conceded to be "personal property," or "demands" under the tax laws, are not subject to taxation, in the absence of a statute providing regulations for assessing or valuing such policies for taxation. Howard, C. J., in a forcible dissenting opinion (Monks, J., therein concurring), maintains that it was the duty of the Legislature to select as subjects of taxation all real and personal property, saving what the constitution exempts; that life insurance policies which have so far matured as to have an absolute present money value are not exempt; that the Legislature has empowered the tax board by clause 9 of Sec. 120 of the tax law (Sec. 8538, Rev. St. 1894) to make such rules and regulations as they deem proper to effectually carry out the purposes for which it was constituted, thereby in effect providing a manner of assessing or valuing such policies for taxation.

## BOOK REVIEWS.

*Engineering and Architectural Jurisprudence.* By John Carson Wait, M.C.E., LL.B. Cloth, pages lxxx., 905. John Wiley & Sons, New York. 1898.

Under this somewhat formidable title the author presents an application of law principles to the facts and circumstances of construction and contracting, and the province of the engineer and the architect. Mr. Wait is a civil engineer of large experience and lately the lecturer upon engineering at Harvard University. He is also an attorney at law and in this book combines his experience in the two lines of work. The work aims at furnishing to the layman that "ounce of prevention" which will keep him out of useless litigation, by showing him how his doings are looked upon by the courts. We think he has accomplished this, and one great means of his success is his ability to state legal ideas in plain language. Mr. Wait has collected a large number of contracts used in undertaking large enterprises and in the light of decisions upon these gives advice as to the proper stipulations to be put into future agreements of a like nature. The lawyer, who must know a little of many subjects, can learn much from a member of both professions. The chapter on expert testimony is most refreshing. We notice with regret that many of the cases, though of some years' standing, are cited only by reference to unofficial reports. To the lawyer this must prove an inconvenience which a little clerical labor would have avoided.

*Report of the Twentieth Annual Meeting of the American Bar Association.* Cloth, pages 592. Dando Printing and Publishing Co., Philadelphia. 1897.

This series always contains much matter of the greatest interest to the profession at large, as well as to the members of the association. This issue presents the address of President Woolworth, reviewing the year's work in legislation, in which he points out present tendencies and the lawyer's duty in remedying them; also that of Governor Griggs on law-making, with others by Messrs. Mather, Wambaugh, Davis, Finch, etc. It is encouraging to the law student to read of the interest taken in his behalf by the older lawyers, as is here shown in the report of the proceedings of the Department of Legal Education. America has always led in its facilities for the law-learner, but much remains to be done.

## MAGAZINE NOTICES.

Among the articles which have appeared in late legal publications are the following:

*Albany Law Journal:*

- Feb'y 19.* The Professions of Law and Medicine, . . . S. B. Livingston.  
*Feb'y 26.* An Examination of the Doctrine of Malice as an  
 Essential Element of Responsibility for Defa-  
 mation Uttered on a Privileged Occasion, W. A. Purrington.  
*M'ch 5.* An Examination, etc., cont., . . . W. A. Purrington.

*Central Law Journal:*

- Feb'y 11.* Modern View of the Nature of Deposits, . . . Nathan Newmark.  
*Feb'y 18.* Abatement of the Smoke Nuisance in large Cities,  
 Eugene McQuillin.  
*Feb'y 25.* Functions of the Trial Judge, . . . M. J. Stevenson.  
*M'ch 4.* Application of Homestead Exemption Laws to  
 Unpaid Rent of Leased Homestead, . . . J. H. Bottum.

*American Law Review—January-February:*

- The Revision of the Constitution of the United States, . . . Walter Clark.  
 Due Process of Law, . . . T. W. Brown.  
 Has the State the Power to Discharge a Debt Due to a Non-  
 Resident, . . . Conrad Reno.  
 Volenti Non Fit Injuria, As a Defense to Actions by Injured  
 Servants, . . . C. B. Labatt.  
 Needed Reform in Criminal Prosecution, . . . Samuel Maxwell.  
 Cessions of Jurisdiction by States to United States, . . . C. N. Lieber.  
 The Law of an Industrial Exposition, . . . S. A. Champion.

*American Law Register—February:*

- The Amount which may be Given by a Donor, Mortis Causa,  
 L. E. Hewitt.  
 A Very Bad Statute, . . . L. S. Landreth.

*Green Bag—March:*

- Abolish the Death Penalty, . . . J. W. Stillman.  
 The True Attitude of Courts and Legislatures upon Labor  
 Questions, . . . F. J. Stimson.

*Virginia Law Register—March:*

- Adversary Possession, . . . H. C. McDowell, Jr.

*Harvard Law Review—March:*

- The Continuity of the Common Law, . . . Sir Frederick Pollock.  
 Liability of Landowners to Children Entering Without Per-  
 mission, . . . Jeremiah Smith.  
 Malice and Unlawful Interference, . . . Ernst Freund.

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## CONSTITUTIONAL QUESTIONS UNDER THE FEDERAL ANTI-TRUST LAW.

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The Federal Anti-Trust Law<sup>1</sup> is confined in its sphere of operation to interstate and foreign trade or commerce. It makes two classes of acts illegal—first, contracts, combinations or conspiracies in restraint of trade or commerce; and second, monopolies of or attempts to monopolize any part of such trade or commerce. The word “trade” adds nothing to the scope of the act, as the word “commerce” embraces everything which is within the constitutional power of Congress. Four remedies are provided for violations of the act—first, they are made crimes; second, they may be enjoined by proceedings in equity; third, property in transit which is the subject of such a contract, combination or conspiracy may be forfeited; and fourth, persons injured may recover treble damages, together with costs and a reasonable attorney’s fee. Prior to the present year this law has been three times before the United States Supreme Court for consideration and two constitutional questions arising under it have been settled.

In the Sugar Trust case,<sup>2</sup> in 1894, the court held in effect that many or most of the so-called “trusts” at which the act was aimed were not within its scope, because Congress has no power under the Constitution to regulate agricultural or manufacturing industries, and that while combinations in such industries might have a great indirect effect upon commerce, that was not sufficient foundation for Congressional interference. In the recent case of the Cast Iron Pipe Trust,<sup>3</sup> the ruling was construed by

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<sup>1</sup> Act of July 2, 1890, c. 647.

<sup>2</sup> U. S. v. E. C. Knight Co., 156 U. S. 1.

<sup>3</sup> U. S. v. Addyston Pipe and Steel Co. *et al.*, 78 Fed. Rep. 712, reversed Feb. 14, 1898, by Mr. Justice Harlan, and Taft and Lurton, JJ., 85 Fed. Rep. 271.

the court of first instance to mean in effect that a combination of manufacturers could not be attacked under this act at all; but the appellate court held that when such a combination adopts methods which directly restrain commerce, it may be and is reached by the Congressional prohibitions.

The Debs case,<sup>4</sup> in 1895, involved consideration of the Anti-Trust Law, but was decided by the Supreme Court wholly upon other grounds.

The Trans-Missouri case,<sup>5</sup> in 1897, finally established the right of a court of equity to prevent violations of this act by its injunction. On petition for rehearing a very strong protest was made against this ruling upon constitutional ground, eminent counsel<sup>6</sup> claiming that this was an invasion of the right of trial by jury, since the offenses thus punished were criminal in their nature. After long consideration the court denied this petition without further opinion. Substantially the same question had been fully argued and decided in the Debs case.<sup>7</sup>

The main question argued in the Trans-Missouri case as to the interpretation of this act was whether its first clause should be given a more literal meaning, prohibiting "every" contract, combination or conspiracy whose main object was in restraint of trade, or whether the word "unreasonable" should be interlined by the court, so that the statute should prohibit only such restraints as should seem to the court or jury unreasonable. In the latter event the clause would have raised a new constitutional question, for it is very doubtful whether merely "unreasonable" actions can be declared penal.<sup>8</sup> The word is not sufficiently definite. Nobody could tell whether he was a criminal or not until he obtained the opinion of some subsequent court or jury as to whether his charges had been too high, or his methods too vigorous. The Supreme Court, by giving the more literal construction to the present statute, avoided this particular objection.

The decision, however, was at once given a very extreme construction by the business world, and raised a storm of fear and indignation out of which sprang a new constitutional objection, first formulated by Mr. W. D. Guthrie in a paper after-

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<sup>4</sup> *In re Debs*, 158 U. S. 564, 600.

<sup>5</sup> *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290.

<sup>6</sup> Including Judge John F. Dillon.

<sup>7</sup> See argument of Lyman Trumbull, 158 U. S. at pp. 575-7, and opinion of Mr. Justice Brewer at pp. 594-6.

<sup>8</sup> *Tozer v. U. S.*, 52 Fed. Rep. 917, 919, per Mr. Justice Brewer; but see the statute enforced without question in *People v. Sheldon*, 139 N. Y. 251, 261.

wards published in *The Harvard Law Review*.<sup>9</sup> His objection was not presented to the court upon the then pending petition for re-hearing in the Trans-Missouri case, but it has been most strenuously and ably urged upon the court in the three cases which were recently argued at its bar and are now in process of decision.<sup>10</sup>

This objection is based upon the Fifth Amendment to the Federal Constitution, which provides that no person shall "be deprived of life, liberty or property without due process of law." It is claimed that one of the rights coming under the head of liberty or property is the right to make contracts; that a general freedom of contract is, therefore, guaranteed by this amendment; that reasonable restraints of trade have been permitted since before the framing of the constitution; and that no reasonable restraints can therefore be prohibited by legislation—the court or jury to be the judge whether or not any given restraint is reasonable.

Mr. Guthrie and his followers largely rely upon the *dictum* of Mr. Justice Peckham in a recent case to the effect that the word "liberty" as used in the Fourteenth Amendment includes the right of every citizen "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."<sup>11</sup>

This phraseology, however, is not to be taken too literally. The same supposed principle was recently invoked by a pension attorney who was being tried for the crime of charging more than \$10 for services in preparing a pension claim. Mr. Justice Brewer overruled the objection and said: "It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It \* \* \* may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of

<sup>9</sup> 11 Harv. Law Rev. 80.

<sup>10</sup> U. S. v. Joint Traffic Association, *Anderson v. U. S.*, and *Hopkins v. U. S.*, argued Feb. 23-25, 1898. The first of these cases is reported below at 76 Fed. Rep. 895. The two latter relate to live stock exchanges at Kansas City, one of them being reported below at 82 Fed. Rep. 529.

<sup>11</sup> *Allgeyer v. Louisiana*, 165 U. S. 578, 589.



his labor, services or property." <sup>12</sup> The statutes of every State are full of restraints upon liberty of contract, as may be seen by referring to the factory laws, the banking and insurance laws, and so many other familiar branches of municipal legislation.

Is there any general legislative power to prohibit reasonable restraints upon trade? Counsel in these cases seem to assume that if the power exists in the Federal legislature with respect to interstate and foreign commerce, it exists also in the State legislatures with respect to all the avocations of life. They say of the *Trans-Missouri* case, "The extent to which this limits the freedom and destroys the property of the individual can scarcely be exaggerated. For it needs no argument to show that contracts and combinations which are most ordinary and indispensable have the effect of restraining trade. As examples may be suggested all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good-will of a business with an agreement not to destroy its value by engaging in similar business; a covenant in a deed restricting the use of real estate. The effect of most business contracts or combinations is to restrain trade in some degree. The precise purpose of the present statute as now construed is to deprive the citizen of the rights which these overwhelming authorities hold that he possesses in this regard." <sup>13</sup>

It will be noticed that under the ruling in the *Sugar Trust* case some of the examples just put do not relate to interstate or foreign commerce at all, while others do not come within the common law definition of a "contract in restraint of trade"—a definition which never included the formation of a partnership

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<sup>12</sup> *Frisbie v. U. S.*, 157 U. S. 160, 165; and see *Holden v. Hardy*, 169 U. S. at pp. 391-3.

<sup>13</sup> Brief of Messrs. Robert W. DeForest and David Willcox in *U. S. v. Joint Traffic Association*.

or corporation. Still, it is a serious matter for the business community if legislatures are to exercise a power which would so seriously interfere with the salability of the good-will of a business, and would make so dangerous the confiding of business secrets to an employee, as this claimed power to make criminal, whether at common law valid or invalid, every covenant which the common law would have considered as "in restraint of trade."

Perhaps we may expect from the Supreme Court, in the cases now pending, some interesting discussion of the above-quoted awful examples. I do not think, however, that such a discussion will be necessary to the decision of these or any other cases which have so far been prosecuted under the Federal Anti-Trust Law; for, first, it is an open question, not now involved, whether the law applies to a restraint of trade which is not the main object of the contract in which it is found, but is merely incidental to the effectuation of some other and lawful object; and, second, the power of Congress over interstate commerce may be much greater than that of any legislative body over the ordinary avocations of life.<sup>14</sup> In the cases now pending the restraint upon trade is not merely ancillary to a sale, lease, employment or other ordinary business transaction, but is the main object of the combination. The Joint Traffic Association is what is called a "traffic pool," being an agreement among the great eastern trunk lines of railway for a division of the traffic among themselves, so as to avoid any competition; and its articles also provide, as in the Trans-Missouri case, for the establishment of minimum rates. The two Kansas City live stock exchanges, if the charges against them be true, are combinations of dealers for the purpose of monopolizing a certain branch of business and conducting it at rates not below a fixed standard.

Now, in the first place, it is still very doubtful whether the Anti-Trust law will be held by the Supreme Court to apply when the restraint of trade is merely ancillary, and in aid of the

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<sup>14</sup> In the Joint Traffic Association case there is the additional reason that the defendants are *quasi* public agents, over whom the law therefore keeps especially close supervision. Whether or not the law can forbid a partnership in an ordinary business, it can certainly forbid the combination of two parallel and competing railroads (*Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 714; see also *State v. Vanderbilt*, 37 Oh. St. 590, 595; and, as to other industries in which the public has a special interest, *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396; *Gamewell Fire Alarm Co. v. Crane*, 160 Mass. 50; *Cast Iron Pipe Trust case*, 85 Fed. Rep. at p. 291).

main purpose of a sale of good will, the employment of a confidential agent, or some other contract for a legal purpose. Statutes in derogation of the common law, especially if they are penal in character, are strictly construed, and from the history of the time we know that the great combinations primarily intended to restrain competition were the objects aimed at, as is indicated by the use of the words "combination" and "conspiracy." Attorney-General Harmon pointed out the distinction in his argument of the *Trans-Missouri* case,<sup>15</sup> and the court carefully reserved its opinion as to these minor restraints.<sup>16</sup> The question is assumed to be still an open one in the *Cast Iron Pipe Trust* opinion, in which Mr. Justice Harlan of the Supreme Court (one of the majority of the court in the *Trans-Missouri* case) concurred. Judge Taft, in that opinion—which probably contains the most complete judicial discussion of the authorities upon contracts in restraint of trade—shows that by the great weight of authority combinations whose main object was to restrain some branch of trade, or wholly or partially monopolize it, have always been invalid at common law; that the partial and reasonable restraints which were valid at common law, and are perhaps still valid in interstate and foreign commerce under this statute, are those which are merely incidental to a sale of property or business, to the formation or dissolution of a partnership, or to the employment of an assistant, servant or agent; the restraints being such as are reasonable and necessary to carry out the purposes of the sale or partnership agreement, or to protect the employer from unjust use of the confidential knowledge acquired in his business by the employee.

In the second place, assuming that Congress has the power to prohibit all combinations in restraint of interstate or foreign commerce, however reasonable the purpose and effect of such combinations may be considered by the courts, does it necessarily follow that the State legislatures have the power to interfere similarly with all the avocations of life? I think not. Congress is acting under an express power—the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." The power acknowledges "no limitations other than those prescribed in the constitution."<sup>17</sup> The limitation here appealed to is found in the words "due

<sup>15</sup> His brief upon this point is to be found at 6 *YALE LAW JOURNAL*, 311-2, 314-6.

<sup>16</sup> 166 U. S., at p. 329.

<sup>17</sup> *Leisy v. Hardin*, 135 U. S. 100, 108.

process of law." These words conserve those personal rights which were regarded as sacred at the time of the adoption of the Constitution.<sup>18</sup> Congress cannot interfere with external commerce where, if at all, interference of the same nature was regarded in 1787 as a violation of liberty or property; but its power over interstate commerce is the same as its power over foreign commerce; it inherited the powers of sovereignty over the latter, and these powers of sovereignty were very wide indeed.

It is hard to realize at the present time that Congress under the Constitution has the abstract right to prohibit interstate commerce altogether. That its powers in this respect are precisely the same as over foreign commerce has been frequently recognized by the Supreme Court.<sup>19</sup> The commercial relations of the States in 1787 were, in fact, those of foreign nations. In surrendering these powers to Congress, no special reservation was made in favor of the trade between the States, and that it has remained so free has been due to the wisdom of the legislature, not to its impotence. In very recent times, however, Congress has asserted its right altogether to prohibit interstate commerce in articles which previously had been allowed free transit through the country so long as they did not make use of the United States mails.<sup>20</sup> In the exercise of a similar power over the foreign and Indian trade Congress has altogether excluded certain articles therefrom<sup>21</sup> and, by an act almost contemporaneous with the Constitution, confined the latter to persons holding special licenses.<sup>22</sup> The latest instance of exclusion is the recent act prohibiting the importation of certain sealskins.<sup>23</sup> The registry and enrollment acts are full of severe restrictions upon commerce by sea. One of the earliest acts, for instance, prohibited dutiable importations in vessels of less than thirty tons burthen.<sup>24</sup>

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<sup>18</sup> *Murray's Lessee v. Hoboken Land and Imp. Co.*, 18 How., 272, 276-7; *Hurtado v. California*, 110 U. S. 516, 535-6.

<sup>19</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 228; *License Cases*, 5 How. 504, 578; *Brown v. Houston*, 114 U. S. 622-630; *Bowman v. Chicago, etc., R. R. Co.*, 125 U. S. 465, 482; *Crutcher v. Kentucky*, 141 U. S. 47, 58; *Pittsburg Co. v. Bates*, 156 U. S. 577, 587; 2 *Story on the Constitution*, § 1065.

<sup>20</sup> *Anti-Lottery Act of March 2, 1895*, c. 191; *Obscene Literature Act of February 8, 1897*, c. 172; see, also, the severe restrictions of the *Interstate Commerce Act* and other legislation referred to by Mr. Justice Brewer in the *Debs* case, 158 U. S. at p. 580.

<sup>21</sup> *United States v. Holliday*, 3 Wall. 407, 416-18.

<sup>22</sup> 1 Stat. 329.

<sup>23</sup> Act of December 29, 1897, Sec. 9.

<sup>24</sup> 1 Stat. 48.

In former times Congress has gone even further in the regulation of foreign commerce, and has stopped it altogether. The embargo was a familiar measure in the legislation of the various States prior to 1787. One State at least recognized it in its constitution, another in its general customs administration law. It was used as a weapon against famine, as well as for war purposes.<sup>25</sup> Their example was followed by the framers of the Constitution, and without questioning their own constitutional right to do it, in the embargo of 1794.<sup>26</sup> Embargoes and non-intercourse acts were thereafter passed from time to time until the war of 1812.<sup>27</sup> They were enforced without constitutional question by many decisions of the Supreme Court,<sup>28</sup> and their constitutionality was referred to by Marshall and Story as an established fact.<sup>29</sup> If Congress can lay an embargo upon all foreign commerce, can it not regulate the manner in which such commerce is to be managed, even to the extent of prohibiting the individuals engaged therein from pooling the traffic or agreeing with each other upon the scale of charges?

Probably any contemporary statesman who was asked how Congress was liable to exercise its power of regulating external commerce, would, like John Adams, have first suggested either absolute prohibition or high duties,<sup>30</sup> and if asked how it was to be regulated if it should be permitted to exist at all, would probably have entered into a discussion of the question whether Congress should allow it to be prosecuted under special licenses,<sup>31</sup> or should make it free to all citizens. The regulation of foreign commerce at that time was so peculiarly a

<sup>25</sup> First Constitution of Maryland, 33; 9 Hening's Va. Statutes (1778), p. 530; 11 *id.* (1783), p. 259.

<sup>26</sup> Joint resolution of March 26, 1794, 1 Stat. 400; Act of June 4, 1794. *id.* 372. The only constitutional objection made was that the act would be an infringement on the right of the Executive, as negotiations for a treaty were pending. The answer was "that the Legislature have solely a right to regulate commerce; that this measure is strictly within the constitutional duty of the Legislature." Madison, Macon, and the strict constructionists voted for it (Annals of Congress, April 18, 1794, pp. 600-1.)

<sup>27</sup> A list of these is to be found at 5 Stat. 826, 829, 846.

<sup>28</sup> A digest of these is to be found at 2 Stat. 451-2.

<sup>29</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 192-3; 2 Story on the Constitution, Secs. 1264, 1289, 1290.

<sup>30</sup> Letter to Jay, 8 Life and Works, 282-3.

<sup>31</sup> The system of licenses for Indian trade has already been alluded to. Licenses were in early days a common feature of the British foreign trade (Leone Levi, *History of British Commerce*, 2d ed. p. 109). They were granted by the State authorities during the revolutionary embargoes (N. Y. Act of March 15, 1781, c. 29; 9 Hening's Va. Statutes, 1778, p. 532).

perquisite of sovereignty that it was common among European nations to grant to some single corporation the sole right to trade with a given region of the world. Thus the Dutch, English, French, Swedes and Danes all had companies exercising exclusive rights of trade with the East Indies, while England had given to various companies similar exclusive rights of trade with Turkey, Africa, the South Sea and Hudson's Bay.<sup>33</sup> The British East India Company continued to have a monopoly of the Chinese trade until 1833, while individual merchants had to get licenses in order to trade with Ceylon, Java or with the neighboring Archipelago.<sup>33</sup> The early congresses, like their successors, wisely refrained from granting similar monopolies; but they would have been astonished at the suggestion that they had no right to prohibit combinations aimed at the establishment of practical monopolies without the permission of the nation.

It is easy to see what serious conflicts are in danger of arising if the Federal courts shall undertake to exercise the *quasi*-legislative powers which are claimed to exist. Counsel often speak of Courts—especially to their faces—as if they carried in their breasts consummate wisdom, while legislators are mere *canaille*, to be held under strict control. However far this may be true, it is at least a fair statement to say that the courts are apt to be more conservative than the legislators, and to represent the educated sentiment of a generation back rather than that of the present day. The decisions now relied upon by counsel as evidencing the length to which a court should go in reviewing the legislative judgment include some which are opposed to the views seriously held by at least a considerable portion of the thinking community. I may instance the decisions which annul laws restricting the hours of labor for women, prohibiting payment of employees in store orders, prohibiting employees from waiving damages for future personal injuries suffered in the course of employment, and requiring railroads to keep flagmen at crossings which legislators regarded as dangerous, but which the court regarded as safe.<sup>34</sup> No branch of the law has shown more continual change in judicial opinion, keeping pace with public opinion, than that which deals with restraints upon trade by contract, and with restraints upon contracts in restraint of trade

<sup>33</sup> Leone Levi, p. 30; Adam Smith, *Wealth of Nations*, Book IV., ch. I.

<sup>33</sup> Leone Levi, pp. 235-6.

<sup>34</sup> *Ritchie v. People*, 155 Ill. 98, 108; *Godcharles v. Wigeman*, 113 Pa. St. 431; *Shaver v. Pennsylvania R. R. Co.*, 71 Fed. Rep. 931; *Toledo Co. v. Jacksonville*, 67 Ill. 37.

by legislation. Contracts which were held void by one generation are held valid by the next, perhaps to become void again with the next stage of industrial development. Nor does any branch of the law show more diversity of judicial opinion. The decision just cited upon hours of labor, though very recent and carefully considered, seems to have been in effect overruled by the United States Supreme Court.<sup>35</sup>

The advanced position now taken by the corporation lawyers concerning the legislative power to limit the right of the individual to make contracts regarding his own affairs, has been clearly and frankly stated as follows: "That right can be limited only so far as may be requisite for the security and welfare of society."<sup>36</sup> It is claimed that the courts are the final judges whether any given law is requisite for this purpose. Such a test would give the courts almost, if not quite, complete revisory power over legislation. Its logical sequence would be a constitutional amendment insuring that the courts should keep in touch with the progress of public opinion by the election of judges for short terms; or, as under the old New York Constitution, by putting the final judicial appeal into the control of a legislative body.

However wise the courts may be, and however foolish the voters and their representatives, the wisdom of continual appeals to the judiciary, based upon maxims in the Bill of Rights, has been questioned by great judges who are no believers in the modern developments of socialistic legislation. In the words of Mr. Justice Brewer:<sup>37</sup> "It may be true, as contended—and, not disturbed by the common hue and cry about monopoly, I am disposed to believe that it is true—that the real interests of the public are subserved by the consolidation of the various transportation systems, and that the putting into the hands and under the control of one corporation the telegraphic business of the country would secure to the public cheaper and better service. But, like the other, this is no question for the courts. This is a government of the people. They express their will through legislative action. It would disarrange our system of government, and would be freighted with peril, if the courts attempted to interpose their opinions upon matters of policy, to stay or thwart such constitutionally expressed judgment."

*Edward B. Whitney.*

NEW YORK CITY, April 1st, 1898.

<sup>35</sup> *Holden v. Hardy*, 169 U. S. 366.

<sup>36</sup> Brief of Messrs. DeForest and Willcox.

<sup>37</sup> *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28, 92.

## ATTACHMENT OF THE BODY UPON CIVIL PROCESS.

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A member of the Hartford County Bar is to be tried by the court next week, at the information of the Grievance Committee of the Bar, upon several charges; the principal one accuses him of using, in a wholesale way, writs with counts in fraud to aid him in collecting debts for his clients. One of these clients conducted a collection business under another than his baptismal name. The offense is a peculiarly mean and cowardly one. Were a lawyer to threaten personal violence to his client's debtor as an alternative to immediate payment of the debt the debtor could at least defend himself, and the result of a scrimmage might find the persecutor at the bottom of the pile. But incarceration by the command of a sovereign State is quite another thing, and one where resistance affords no chance for victory. The method charged upon this man is that he instituted such writs by the hundred in trying to collect debts; if a defendant appeared he withdrew the suit or struck out the counts in fraud and took judgment upon the counts in contract. In most cases the debtor, who did not understand the perils of an action in tort, paid no attention to the suit and let judgment go against him by default. Then, armed with an execution which ran against the body the lawyer proceeded to make it quite unpleasant for the defendant, and of course in many cases extorted money from parties, who thought commitment to jail inconvenient and undesirable. This practice, whether or not carried on by this man, who denies it, is said to be not infrequently used by miscreants who get into the profession. Can we purge the community of such offenses by occasionally hunting down a shining example of wickedness and disbarring him? We think a more comprehensive remedy should be sought. Some years ago the New Haven bar, either as a body or by leading representatives, proposed, at a State bar meeting, that attachments of property upon mesne process should be with some exceptions, abolished. This would have been a return to common law practice. The measure on the whole was deemed to be too radical and too destructive of long-continued usage, whose results are woven into our habits and jurisprudence.



In Connecticut an attachment of property upon mesne process is obtained very easily. The State allows the signature of writs which command attachments by many officials, including justices of the peace and commissioners of the Superior Court. As these offices are practically open to all members of the bar, the statutes therefore permit all lawyers to issue writs with directions to attach property in favor of their clients. This right is some times abused, and the New Haven lawyers before alluded to cited instances of gross abuse. But excessive attachments of property are easily cut down and all such attachments are dissoluble upon substitution of a bond. But the attachment of a debtor's body, although equally easy to obtain, leads to quite different results and larger annoyances.

At common law a *capias* was issued after proof that the judgment was unsatisfied, and the poor defendant was taken to prison where there was a moral certainty that he could not satisfy the judgment, as the law by the very fact of his incarceration, took away his earning capacity. The English prisons in earlier days were full of poor fellows, held in their vile chambers, not for punishment—for nearly all criminals were disposed of by the death penalty—but for detention. Modern civilization abolished imprisonment for debt. Connecticut fell into this good line in 1842. But an attachment of a defendant's body upon mesne and final process is still open in suits for torts. Meantime the criminal law has been enlarged to protect society more fully than formerly, against swindlers and breakers of trust.

The process of attaching the body in civil process is seldom used for a morally legitimate purpose, if there is any such purpose, because the provisions of the statutes relative to freedom of jail limits and the poor debtor's oath, and for getting possession of a defendant's property by disclosure and other proceedings in insolvency, make its use unprofitable to the suitor. The plaintiff incurs all the initial expenses of the process, and usually discovers in the end that he has only sent more good money in an ineffectual effort to collect a bad claim.

Recurring to our original question, how can the abuse of this power by scoundrelly lawyers—and we should be thankful that the profession is so seldom dishonored by them—be prevented? These plans suggest themselves:

First. Require of the plaintiff that he furnish to the magistrate who issues the writ proof by affidavit of the propriety of the process and the sufficiency of his testimony to sustain it.

This would introduce the affidavit system into Connecticut, which has been wisely avoided and which has made New York practice open to so sharp criticism. Perhaps it is a necessity in so large a city as Greater New York. Nor would it be difficult for the lawyer who inspires the proceeding to get affidavits from parties, whom it would be difficult to find in a later prosecution for perjury, but whose written statements, in the absence of complicity, would be a justification of his issuing the writ.

Second. Require the Plaintiff in all suits which command an attachment of the body to procure the approval of their service, by written endorsement upon the process of a Judge of the Superior Court or other court of general jurisdiction. This plan would be safer than the affidavit plan.

Third. Abolish all attachments of the body upon civil process. While this method would in a few instances deprive suitors of a privilege which has heretofore been serviceable, we believe that these cases are so few and so infrequently necessary or even profitable, that on the whole they would better give way for the general good.

Attachment of the body in civil process has no justification as a method of satisfying a fair claim, either in contract or tort. To shut up a man in prison doesn't in any degree or to any extent pay the debt or damage. In this regard it satisfies only a sense of vengeance, which should have no place in the philosophy of Christian jurisprudence or Christian civilization. On the other hand the gratification of this passion is harmful to the community, including the plaintiff. Punishment for frauds is better confined to such offenses as are so harmful to the public as to be the subject of criminal law. The only real justification of the procedure is that men who have property sometimes prefer to produce it to satisfy their obligations, rather than to go to jail. This argument carried to its logical extreme would include debtors as well as tortfeasors. But there is in theory an essential difference between debts and torts. The moral distinctions, however, often disappear in practice. A man who innocently converts a piece of personal property to his own use, and is unable to answer a judgment for its value, is guilty of a tort, but he may be much less worthy of incarceration for failing to satisfy the judgment than his neighbor, who laughs at an execution issued to collect his note which he could easily enough pay.

What with our abundant means of compelling disclosures in

civil actions and in courts of bankruptcy and insolvency, and, if they are not broad and comprehensive enough, they can be enlarged, it would seem as if the practice of holding the body of a man, woman or child, for a breach of duty to a plaintiff is a relic of earlier days, when cruelty and vengeance were deemed to be commendable elements in the philosophy of jurisprudence. Can we not trace it farther back, even to the uncivilization which allowed creditors of all kinds to reduce debtors to slavery, and which gave to the creditor a dominion over the body of his offending debtor?

We believe that such a step as the abolition of attachments of the body upon civil process taken by our Legislature would be in the way of progress, and as a certain result and one in which the community is deeply interested, would help to keep a noble profession pure from the presence of a small gang of petty extortioners and pirates, who now use the honored name of lawyer to prosecute a business which should only sail under a black flag.

*Henry C. Robinson.*

HARTFORD, March 4th.

## RECEIVERSHIPS.

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One of the most interesting lines of practice of a lawyer is that of receiverships. They differ very materially from insolvency proceedings; the matters involved are, as a rule, large, as courts will not appoint receivers where the amount involved is trivial, and the discretion and authority conferred upon a receiver who is, in fact as well as theory, the arm of the court, is generally so ample that he is not hampered in his management by the fixed and unchangeable rules which restrain a trustee. The method of attacking a receiver's administration of an estate is so much more formal than that of attacking a trustee's administration, that there is always warning of approaching difficulty, and generally, if the matter cannot be satisfactorily adjusted for the interests of all concerned, between the parties, a creditors' meeting will arrange it without undue publicity. In the Probate Court, due to its informalities, often the first information that counsel has of impending trouble is when he receives notice from the judge to appear and be heard, when all the secret history and troubles of the insolvent and the practical difficulties of disposing of his estate satisfactorily, are likely to be aired to the public, through the press, generally to the great detriment of the property to be administered upon, and the ultimate loss of the creditors. The undue haste made necessary by our statutes in the settlement of insolvent estates, does not exist in receiverships, and this frequently allows a reorganization of the property, which otherwise would have been needlessly sacrificed at a forced sale.

The practical importance of having the wisdom of successful men of large experience, like the judges of our higher courts, pass on disputed or contested questions that may arise in the settlement of a concern's affairs, always commends itself to a client. The power, however, to continue the business, which the court frequently confers upon a receiver is the great reason of his superior usefulness.

Receiverships are of great variety, but those simply to collect rents under a foreclosure or to hold possession or administer property pending litigation, are so small in importance as compared with the class of receiverships which involve the settlement of properties, that they can be passed over without notice.

As receivers are only appointed by courts having equitable jurisdiction it is always necessary, in the absence of statutes, to allege facts in the complaint which entitle the court to take cognizance of them as a court of equity. Statutes, however, enlarging the jurisdiction of courts of equity in this respect, are very common. In the absence of a statute a simple creditor of a corporation must show that he has a valid claim against the corporation and that he has exhausted his legal remedies before he can secure the appointment of a receiver, and he must show further that there are assets applicable to the payment of his claim that are liable to be wasted, and that the circumstances are such that to deny the application would entail loss upon him. To show the difficulty of a creditor in securing a receiver for a corporation, it is only necessary to refer to the following cases, which are extremely interesting, as showing the powers of a court of equity in this respect:

*Falmouth National Bank v. Cape Cod Ship Canal Co.*, 166 Mass 550; *Hollins v. Brierfield Coal and Iron Co.*, 150 U. S. 371.

This last case also holds that even the statute of a State authorizing a creditor to obtain a receiver for a corporation in State courts, would not be recognized in the Federal courts, the case holding that "the line of demarcation between equitable and legal remedies in the Federal courts cannot be obliterated by State legislation."

Usually a receivership is brought about by the action of the insolvent corporation itself, rather than by a suit at the instance of a creditor, stockholder, or bondholder, although in such cases it almost invariably takes the form of a friendly suit, wherein the corporation accepts service of the papers, consents that the same may be entered on the docket of the court immediately, and that the prayer of the papers for a receiver may forthwith be granted. Of course there is always some trouble which precipitates a receivership, like a threatened attachment, or a large amount of indebtedness about to become due, or something of that nature, by which it is rendered necessary—for the preservation of the business or property and the equal protection of all interests—that it should be placed in the hands of the court. It is infrequent, as a rule, that trouble actually occurs before the receiver is appointed, and this is especially the rule, as no attachment or lien is set aside by a receivership, as the receiver takes the property as he finds it unless there is a special statute providing for this contingency. In many States, including our own—Connecticut—there is such a special statute: these

statutes were designed to remedy the great injustice that frequently occurred from an attachment being placed on the property just prior to the receivership, which, from the necessities of the situation, had to be satisfied in full. In such cases the only remedy for an outside creditor was to bring insolvency proceedings to set aside the attachment in States where the bringing of such proceedings has this effect, as it has in many of the States. Even now, in this State, our statute just mentioned is defectively drawn, so that a preference made just before the receivership is still valid, and it is necessary in order to fully protect creditors to frequently resort to insolvency proceedings in addition to the receivership in order to set aside preferences to favored creditors. The reason for the great haste generally shown in the appointment of the receiver has, with the enactment of these statutes, passed away, except in cases where the property is situated in several States.

Formerly receivers were almost universally appointed in chambers, at all times of the day and night, and a receiver once so appointed was rarely disturbed or removed except for cause. This last statement is true to a large extent now, but a change seems to be occurring in this respect, in this jurisdiction, and now judges very frequently appoint a temporary receiver with a comparatively small bond and fix a day for the appointment of a permanent receiver and order notice of it to be forthwith given to all parties in interest; and this practice, when followed, does not put upon objecting creditors who desire the appointment of another person than the nominee of the corporation, for receiver, the burden of showing that the first incumbent is incompetent or undesirable, thus greatly lightening the burdens of the objecting creditors. However, it is a matter of justice to an insolvent concern, in many cases where its affairs have been honestly managed, that the old management should not be entirely ignored in the receivership, and as a rule judges and courts are inclined to look with favor upon the employment of those connected with the business to continue it, and frequently the receiver himself is from the old management. When this is purposed, however, it is safer, if trouble is anticipated, to have some one from an outside business, who is a creditor, with him, as a co-receiver, who represents the creditors, and who by his presence as co-receiver will assure to them a speedy settlement of the concern's affairs, and also will guard against the mistakes which may have been the cause of the troubles of the old concern. Again, if a re-organization is undertaken, it is frequently

very embarrassing to have a member of the old corporation as sole receiver. As a rule, trustees in insolvency have no greater authority than to complete existing contracts and work up materials on hand, while a receiver under authority of the court may carry on the business and, if the creditors are willing, sometimes the existence of a receivership may be prolonged over many years, the receiver conducting the business the same as the corporation itself would have done. Some judges are extremely strict on this point, and desire in every way that they can to shorten the lives of receiverships, while other judges are very liberal and pay little attention to the matter.

As a matter of justice to private enterprises of a similar nature in the community, it would seem as though they should be saved as much as possible from the unfair and irresponsible competition of business concerns under a receivership, conducting a business for years, for receivers as a rule dispose of what they have on hand below actual cost. It makes but little difference when they do business, whether they do it at a large profit or at about cost, for if they need money, by applying to the court they may issue receiver's certificates and so use up in competition, which ordinary business men cannot meet, the assets of the receivership. Private concerns, for self-protection from this competition, which destroys profits and living expenses, are frequently forced to buy the assets of the receivership.

Where a receiver has no ready money in his hands to conduct the business of the receivership, it is often necessary, if he proposes to carry it on, to raise sufficient money to do so. As a rule the receiver of a manufacturing concern can secure all the credit he needs simply by ordering goods, but receivers of very large corporations, or railroads, almost invariably have to raise ready money, and this is done by issuing receiver's certificates to an amount and in sums as authorized by the court. There is no difficulty where a concern has large assets, in disposing of these certificates, or promissory notes, of the receiver, to banks and individuals. These receiver's certificates, it is needless to say, are a first lien upon the property as it comes into the hands of the receiver, and if the property is unincumbered they are really a first mortgage on all the assets, both real and personal.

The power of the receiver to incur obligations for supplies, materials, etc., is incidental to the power granted to continue the business (*Cake v. Mohun*, 164 U. S. 311). In this way it sometimes happens that great inroads are made upon the assets

of a receivership, even when no power is granted by the court to issue receiver's certificates.

A receivership does not extinguish the corporate life of a corporation, it merely suspends it. Quite frequently the dissolution of the corporation is asked for and is granted in the judgment. However, in any case the corporate life is so far suspended that it is not necessary for the officers of the corporation in a receiver's hands to make annual returns as required by statute.

The court so far protects a receiver in the performance of his duty that it is contempt of court on the part of anyone to sue him, or to make him a defendant in a suit at law, or to in any way interfere with the business of his receivership, unless special permission from the court has first been obtained. Courts are extremely jealous of their receivers in this respect; so jealous that all it is generally necessary to do is to call the attention of opposing counsel to the fact that he is in contempt, and it is very seldom that the attempted interference with a receiver's powers is actually brought to the attention of the court.

It is necessary for a receiver to secure special permission before he brings a suit, or even employs counsel; but in practice all these matters regarding the powers of the receiver are provided for in the order appointing him.

An interesting question in receiverships is that of the taxation of the property. In theory it would seem as though property vested in a receiver should not be taxed and this seems to be the better doctrine. However, that the property should pay taxes somewhere is manifest equity. In theory, property in the hands of a receiver ultimately belongs to the creditors, or stockholders, or members of the corporation, or partnership, in the receiver's hands, as the case may be, but the difficulty in reaching property so situated, for taxation, has led to the almost universal practice of taxing property in the hands of the receiver, and of his applying to the court for permission to pay them; but the receiver has no power, without special permission, to pay taxes, and he will be protected by the court from the tax collector, if need be. Questions concerning taxes seldom arise where the estate is more than sufficient to pay the expenses of the receivership, as the practice is as above indicated, in this jurisdiction. The case of *Brooks v. Town of Hartford*, 61 Conn. 124, bearing upon this subject, is a very interesting one. The practical difficulties of the situation and the manifest equities in favor of charging the property in the hands



of a receiver with its just burden of taxation, have perhaps thus far prevented a decision squarely on this point, although this case would seem to indicate that if this question was squarely presented to our highest court for decision it would be settled that property in the hands of a receiver would not be subject to taxation.

The most troublesome question in the management of receiverships is the extraterritorial authority of the receiver. A receiver appointed in one State has no authority outside the jurisdiction of the State that appoints him, save by the courtesy or comity of the other States, and this courtesy or comity is not always extended, although in recent opinions the authority of receivers in other States has been quite generally recognized, where it does not interfere with existing rights of its own citizens; the tendency is decidedly towards giving foreign receivers greater authority.

The general rule seems to be, as to property belonging to the estate, but situated outside the limits of the jurisdiction appointing the receiver, that the attaching creditor will hold the property, if the attachment, or lien, or other method of security, was obtained before the receiver actually took possession. If the receiver actually takes possession of property belonging to the estate before the attachment is made, he holds the property. In this State there is a very interesting coterie of cases treating of the powers of receivers and trustees in insolvency in this respect—*Paine v. Lester*, 44 Conn. 196; *Pond v. Cooke*, 45 Conn. 126; *Blake Crusher Co. v. New Haven*, 46 Conn. 473; *Cooke v. Orange*, 48 Conn. 401.

As to the receiver's title to accounts outside the State, of course the rule as to the location of personal property is well known, but very frequently under the laws that exist in various jurisdictions, it is a race between the creditors outside the jurisdiction of the court appointing the receiver, and the receiver, to secure possession of accounts belonging to the receiver's estate, owing by persons or corporations outside the State. The laws of the several States are singularly defective in this respect, and great injustice is often done, certain creditors practically securing their claims in full while others share only in the very meagre dividend which the estate may yield. The inequities of the situation should be remedied in some way by uniform legislation throughout the several States. The receiver's title and the recognition of that title is manifestly limited to the jurisdiction of the court that appoints him, but this can be overcome in

a measure, by having the corporation or partnership passing into the hands of the receiver make a common-law assignment of all book accounts and credits to the receiver, and then by the use of the telegraph or telephone, giving notice to all the creditors outside the State that the claim has been assigned to the receiver, following the messages with the usual notices of assignment, in writing. A common-law assignment is recognized as transferring the title, everywhere, no matter in what jurisdiction it is made.

*Egbert v. Baker*, 58 Conn. 319; *First National Bank of Rockville v. Walker*, 61 Conn. 154.

The law in regard to the necessity of notice of the assignment differs in different States, some holding that notice is necessary and others that it is not necessary. In Massachusetts no notice is necessary; in Connecticut notice is necessary. On this subject of an assignment and its effect in another jurisdiction, the case of *Clark v. Connecticut Peat Co.*, 35 Conn. 303, is an especially interesting one.

There is another doctrine which is now just becoming generally understood and used, and which is of great benefit to creditors in the equal distribution of the property in insolvency proceedings or under a receivership, and that is the doctrine which was first prominently brought to the notice of the profession in the case of *Cole v. Cunningham*, 133 U. S. 107. This is too short an article to discuss these interesting subjects at length, but this doctrine is in substance that a court having jurisdiction both of the estate to be settled, and of an attaching creditor who claims under the laws of another State, to have an attachment on property belonging to the estate, which was secured prior to the actual insolvency or the receivership, but with knowledge of such steps being taken, will, as a court of equity, acting *in personam*, enjoin such a creditor so having security from availing himself of the benefit of his security, as against the receiver, and so secure the property for the benefit of all the creditors. As good a statement of this principle of law as can be found anywhere is contained in *Cook on Stockholders*, third edition, Section 867, and note on page 1425. The case of *Cole v. Cunningham* concerned insolvency proceedings, but the principles apply to receiverships as well, so the case has become the leading one on this subject. The language of this very learned opinion at once suggests, whether a court having jurisdiction of a receivership, and a creditor without the State with an attachment either obtained after the appointment of the

receiver, or under the circumstances just mentioned, who presents his claim to the receiver for a dividend from the property, would not, as court of equity, extend the doctrine of *Cole v. Cunningham*, so as to compel him to relinquish his security for the benefit of the receivership before allowing his claim for a dividend. This question has now by inference been practically decided in *Reynolds v. Adden*, 136 U. S. 348; this case holds that a creditor not coming within the jurisdiction, of course can take advantage of his attachment in another State as against the receiver, but from reading the opinion, in which this question is touched on, one forms the conclusion that it is not probable that any court would allow, when its attention is called to the fact, a creditor outside its jurisdiction, to at the same time take advantage of such an attachment, and also to take a dividend from the estate. Because of the difficulty of reaching a creditor outside the jurisdiction, it would seem as though courts would, in the future, be frequently called upon to exercise this power.

In connection with receiverships in different States some of the nicest questions arise. Quite frequently, especially in the courts of Massachusetts, it will be found that although receivers are appointed simultaneously in several States, yet the courts there insist upon a complete administration of the affairs of the receivership in that State, down to and including the final dividend, judgment, and order discharging the receiver, although it may be really only an ancillary receivership. In New York State, they are more liberal, and if it happens that the estate is partly in New York and partly in Connecticut, and the corporation is a Connecticut corporation, and all the claims are presented in Connecticut, an order can generally be secured for the removal of the property in New York, after it has been turned into cash, into Connecticut, to be administered upon and divided among the creditors in Connecticut. If all the creditors do not present their claims in both jurisdictions the courts will, if it is suggested to them, order an extension of time in which the creditors are to present their claims, and that notice of it be given to them, so that they will all share alike. As a rule, receiverships in different jurisdictions have to go through their natural course and creditors who fail to present claims in both jurisdictions do not fare alike, but only receive a dividend in the jurisdiction where they presented their claims. It is to be hoped that the American Bar Association will use its great influence to secure a uniformity of practice throughout the States of the

Union, regarding the winding up and settlement of properties which have assets in more than one jurisdiction, so that there may be but one receivership necessary, which is recognized as binding in all the States. It will not only save to creditors the large expense of separate receiverships in each jurisdiction, but will at the same time be equitable in its practical workings in securing an equal distribution of the assets of the receivership.

NEW HAVEN, April 1st, 1898.

*Samuel C. Morehouse.*

## THE USE OF MOTIONS AND DEMURRERS IN CONNECTICUT PRACTICE.

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[The following memorandum of decision filed some months since by Hon. Samuel O. Prentice, Judge of the Connecticut Superior Court, in a case pending before that Court in Hartford County has recently been called to our attention. The subject with which it deals is such an important one that we have obtained a copy for publication. It is sufficient for its clear understanding to know that it was called forth by a motion to erase one of the defenses of the answer for the reason that the defense did not contain a good and sufficient answer to the complaint.—EDITORS.]

THE AMERICAN PAPER GOODS CO.,	v.	
A. F. WOODING, et al.		} <i>Superior Court.</i> } <i>Hartford County.</i>

### MEMORANDUM UPON MOTION TO ERASE SECOND DEFENSE OF ANSWER.

A demurrer is the proper pleading to secure the object sought by this motion. It is not the province of a motion to try the sufficiency of a pleading in matter of substance. Under general code rules the conditions are rare where a motion to erase the whole of a pleading, that is, the whole of a statement of a cause of action or ground of defense, is an appropriate remedy. Such conditions, however, there are, as for instance:

1. Where there was no right to file the pleading.
2. Where the pleading is so defective in form or improper in matter or substance that it ought not to be placed on file.
3. Where the pleading contains such indecent, indecorous or scandalous matter that it ought not to become a part of the record.
4. Where the pleading is a sham or frivolous one.

Where a pleading is a mere pretense—one good in form but false in fact, and not pleaded in good faith, its character being clearly apparent upon mere inspection—it is a sham plea, and may be stricken out on motion.

Where a pleading is on bare inspection and without argument or consideration so clearly and palpably bad, imperfect,

irrelevant or evasive as to indicate bad faith in the pleader, it is frivolous, and may in like manner be stricken out.

Beyond this I take it general code rules have not gone in permitting the striking out upon motion of whole counts or defenses. The sufficiency in matter of substance of any pleading is not allowed to be thus tried. Demurrers are alone the appropriate means to that end. (Phillips Code Pleadings, Sections 278, 279.)

The Connecticut rule upon this subject, III., section 9, provides that the Court may order any pleading stricken out which discloses no reasonable ground of action or defense. At first sight this rule appears to give to motions to strike out a more comprehensive scope than is ordinarily given to them. I am of the opinion, however, that it should receive, as it easily may, such a construction that it will in its operation harmonize with the general code rules which I have stated, and which I regard as furnishing an intelligent, consistent and common sense mode of procedure. It should not be interpreted as authorizing an usurpation in a large but indefinite line of cases of the office of demurrers by motions. To justify the employment of a motion to erase, the absence of "reasonable ground" should be so obvious that upon mere inspection and without consideration or argument it would be manifest to any reasonable mind, and therefore so obvious as to impute bad faith to the pleader. Any pleading properly filed which does not thus bear upon its face the marks of bad faith, either actual or constructive, is entitled to be tested for its sufficiency upon demurrer.

By reason of the unfortunate or uncertain phraseology of two of our rules—the one already referred to, and IV., Section 10, there has arisen some confusion in practice in the use of motions and demurrers. I understand the true rule to be as follows:

1. Where it is sought to attack a part only of any pleading, that is, of any statement of a cause of action or ground of defense, for any cause, it should be done by motion, and not by demurrer.

2. Where any pleading is as a whole claimed to be sham, or frivolous, or improperly filed, or unfit by reason of its indecent or scandalous allegations to become a part of the record, or so defective in form or improper in matter or substance that it ought not to remain as a part of the file, a motion to strike it out is the proper proceeding.

3. Where it is sought to attack the whole of any pleading for its insufficiency in matter of law, save under the exceptional

circumstances hereinbefore indicated, it should be done by demurrer.

In interpreting and applying Rule 2 defects of form and substance should be construed to embrace uncertainty, obscurity, impertinence, prolixity and unnecessary repetition when characteristic of an entire pleading. Section 882 of the General Statutes has expressly made these faults grounds for motions to expunge pleadings. By our Supreme Court departure has been held to be a defect of like character. *Logiodice v. Gannon*, 60 Ct. 81.

The pleading to which this motion is addressed was filed in rightful order, is proper in form, unobjectionable in matter, and not of the kind which the law denominates as either sham or frivolous. It is one from which no implication of bad faith on the part of the pleader can arise. It may be insufficient, but it is nothing worse. The claim is made that it is insufficient and palpably so. Granting this, it does not follow, and cannot be fairly said, that it partakes of the qualities of a sham or frivolous defense, or that its insufficiencies are so obvious as to make it a defense in bad faith. Its insufficiencies must therefore be reached by demurrer alone.

The motion is therefore denied.

*Prentice, J.*

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## ASSESSMENT OF DAMAGES UPON DEFAULT.

NUMEROUS State statutes wisely permit the assessment of liquidated damages by the clerk upon a default. On authority, such statutes are not in violation of the constitutional right of trial by jury. The United States Courts, in one of the Circuits, have uniformly refused to conform to the State practice in this respect and in one District a formal rule forbids the assessment of damages upon default otherwise than by a jury. The authority of the court to adopt such a rule may well be questioned. The unwisdom of the requirement is apparent.

The Federal Constitution created no right of trial by jury: it guaranteed the then existing common law right. At common law, upon a default, the assessment of damages, whether liquidated or unliquidated, was never referable of right to a jury. In the last century the established practice of the courts of King's Bench and Common Pleas, where judgment was recovered by default upon a bill of exchange or promissory note, was "to refer it to the master or prothonotary to ascertain what is due for principal, interest and costs." *Raymond v. Danbury and Norwalk R. R. Co.*, 14 Blatchf. 133. Even when a writ of inquiry was allowed the court was not bound by the jury's finding. *Vin. Abr.* 301. In *Bruce v. Rawlins*, 3 Wilson, 62 (action of trespass and false imprisonment), Lord Chief Justice Wilmot said: "There is also a difference between a principal verdict of a jury and a writ of inquiry of damages, the latter being only an inquest of office to inform the conscience of the court, and which they might have assessed themselves without any inquest



at all." As early as 1797, the Supreme Court of the United States decided that the Federal courts were at liberty to follow the State practice in this particular. *Brown v. Braam*, 3 Dallas 344. Judge Shipman, in *Raymond v. D. & N. R. R. Co.*, *supra*, absolutely denies the constitutional right to have damages assessed by a jury after default. The Circuit Courts are now required to conform to the State practice "as near as may be, any rule of practice to the contrary notwithstanding." R. S. 914. In certain specified cases, upon default, the damages, if unliquidated, must, upon request of either party, be assessed by a jury. R. S. 961.

The amount due upon a promissory note, the cause of action standing confessed, is not a matter of judgment or of conscience, but of law. The intervention of a jury is therefore mere form. How an insistence on this mere form can be defended in the face of its obvious inconvenience, the authoritative denial of any right to it, and the "as near as may be" statutory provision is not plain.

\* \* \*

THE questions arising from the disaster to the *Maine*, though some of them without precedent, have been rendered clearer by the application of legal principles; and the consideration of this lamentable affair from the dispassionate and unprejudiced standpoint of the law, has done much to prevent hasty judgment and the impulses of passion from injuring our cause. This indicates the importance, the practicality of the study of international law, the application of legal logic, which has been said to be nothing more than "common sense," to the relations of nations. Indeed, recent events have impressed us with the value of this branch of legal study as a means tending to do away with war and making for universal peace and harmony.

International law cannot be invariably enforced, for the same and the obvious reasons that make arbitration at times impracticable; yet this is no reason for rejecting the subject as something only for the theorist. But it seems that the world has been slow to appreciate the value of a system by which friction in international intercourse might be in many cases prevented and in all cases reduced. The development of individuals is far in advance of the progress of nations in respect of invoking legal principles to govern the enforcement of rights and the discharge of duties. There was a time when, between man and man, as well as between nations, might was right; when differences were settled and wrongs redressed by a personal combat.

of the parties. Later arose, from considerations of expediency as well as of morals which nations have not recognized, rude systems of justice, from which the present prevailing system has developed. But, in international affairs, might is still, to a deplorable degree, the only right existing, and nations have continued for centuries to settle their disagreements in much the same old way.

Science, by improvement in ordnance and explosives, has brought the destructive possibilities of war to a point horrible to contemplate, and, if as some hopefully believe, modern progress in the invention of weapons of warfare should soon afford a practical discouragement to war, the study of international law will become all the more important and especially to those who have hope of holding high places in our government. Even now, knowledge of the subject is indispensable to men in the diplomatic service and to all others who represent the country in international affairs.

\* \* \*

THE JOURNAL is pleased to announce the election to the editorial board of the following men:

Harrison Hewitt, Knox Maddox, R. L. Munger, A. W. Powell, L. M. Sonnenberg, C. H. Studinski.

The successful thesis in competition for the LAW JOURNAL Prize was written by C. H. Studinski

## COMMENT.

In *Ritter v. Mutual Life Insurance Co.*, 18 Sup. Ct. 300, the Supreme Court recently decided that intentional self-destruction by the insured when of sound mind is a defense to an action on the policy, even though the policy does not expressly declare that suicide will avoid it. One Runk, becoming hopelessly embarrassed financially, owing to speculation and squandering of trust property, took out a large amount of insurance with the intention of committing suicide and thereby leaving his executors enough money with which to pay his debts. The court held that an implied condition that the insured will not purposely, when of sound mind, take his own life, must be read into the policy for two principal reasons. First, because a contrary agreement could not have been within the contemplation of the parties at the time, for it is reasonably certain that the company would instantly reject such an application. Life insurance policies in this respect are like fire insurance policies—though they will cover losses attributable merely to negligence of the insured, without fraud, they will not cover losses intentionally caused by the insured. "To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay was intended to be left to his option." And, second, because a contract of insurance expressly providing for payment in such event would be against public policy as tempting or encouraging the insured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. The leading case on this point is *Fauntleroy's case* (*Amicable Society, etc., v. Bolland*, 4 Bligh N. R. 194), decided in 1830, holding that death at the hands of the law as punishment for committing a crime would avoid a contract of insurance though there was no such exception in the policy.

Such a conclusion seems only natural and yet several State courts have reached a contrary result, though without much discussion of the subject and perhaps on doubtful grounds (see *Fitch v. Insurance Co.*, 59 N. Y. 557; *Mills v. Rebstock*, 29 Minn. 380; *Northwestern, etc., Association of Illinois v. Wanner*, 24 Ill. App. 357; *Morris v. State Mutual Assurance Co.*, 39 Atl. Rep. (Penn.) 52). These all rest on the first case of *Fitch v. Ins. Co.*, which held that the insured could recover because the policy was taken out for the benefit, not of himself, but of his wife and children, and although they were bound by his representations, and any fraud he may have committed in taking out the policy, \* \* \* yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the

policy." And in this way the Pennsylvania Court distinguishes *Ritter v. Ins. Co.*, from its own case. But if an implied condition must be read into the policy that the insured, while sane, will not voluntarily destroy his life, *i. e.*, that the contract cannot cover the risk of suicide, it would seem according to their own reasoning as if it made no difference who the beneficiary might be. In *Smith v. National Benefit Society*, 123 N. Y. 85, when the facts were strikingly similar to those in *Ritter v. Ins. Co.*, the company set up as a defense the fraudulent scheme of the insured to take out a large amount of insurance and then commit suicide and were permitted to prove the suicide as one of the steps—the final completing—of the scheme and thus got around the earlier decision in *Fitch v. Ins. Co.*

The Alabama Supreme Court takes a long step in advance in *Drennon v. Mercantile Trust and Deposit Co.*, 23 So. Rep. 164, when it extends to a private mining and coke manufacturing corporation the six months preferred claim rule giving priority to the claims of laborers for wages rendered and of material men for supplies furnished within six months previous to the appointment of a receiver. This is the doctrine first clearly laid down by Chief Justice Waite in *Fosdick v. Schall*, 99 U. S. 235, when the concern was a railroad corporation. Stress was laid upon that fact in the opinion. In *Kneeland v. Trust Co.*, 136 U. S. 89, the Supreme Court expressly declared that the doctrine would not be extended beyond the exceptional case of a railroad. And it is believed that heretofore the courts have been unanimous in refusing to extend its application and in maintaining a broad distinction between railroad and other corporations. But the Alabama Court (two judges dissenting) proceed upon the theory that "the bondholders, or the receiver for them, have property, or something of value, to which the party invoking the court's aid has a better abstract right—a superior equity." And this equity arises and is rested upon one or other of three states of fact: (1) That the gross earnings of the corporation before the receivership, to which its laborers and persons furnishing necessary supplies are entitled in preference to the bondholders, have been diverted from them to the bondholders or expended in permanently improving the mortgaged property, or are in the hands of the receiver to be so paid or expended in further operation of the works for the benefit of the bondholders. (2) That, whether there has been any such diversion of the gross earnings directly or indirectly or not, the laborers have performed services in permanently improving the mortgaged property, which have inured directly to the benefit of the bondholders in enhancing the value of their security. (3) That services have been rendered in keeping the corporation "a going concern," that earnings have been thus realized and paid to the bondholders or held by the receivers, while the laborers have not been paid for services thus rendered prior to the receiverships. Different decisions of the

Supreme Court fully show the application of the doctrine to these three states of facts in the case of railroad corporations. But the Alabama Court claims that this equity exists as well in the case of a private as well as a public corporation. The right to be asserted is the same, the wrong done the employees is the same, the remedy is applied on considerations which take no account of whether the corporation is public or private, railroad or manufacturing, the maxim that he who seeks equity in applying for a receiver must do equity, applies as much to one as to another. Doubtless the necessity for the application of the doctrine arises more frequently in railroad cases, and ordinarily there is a greater necessity that they be kept "going concerns" from the point of view of the public; but from the point of view of the bondholders there is no such greater necessity and this necessity should be determined from their standpoint. The limitations which the principles of the doctrine themselves involve, prevent any encroachment upon vested rights or any usurpation of mechanic's lien laws; for they mark a distinct line between the particular corporation cases to which the doctrine applies and the ordinary cases of mortgages on property to secure the payment of debts; "there is not the slightest danger of the secured creditor in any case losing anything which he is entitled to on recognized principles of equity and good conscience."

Judge Coleman dissenting says that "the doctrine is a revolution in jurisprudence, subverting settled principles, and not the application of new remedies to existing rights," and that the gross income covered by prior executed mortgage does not belong in any sense to the laborer or material man as a matter of equitable right, but to the bondholder who by contract has secured a prior lien thereon, which the laborer and material man knew existed when they furnished their services or supplies. And *Fosdick v. Schall* is not based upon this theory of an abstract equity but upon the power of the court to impose conditions precedent to the appointment of a receiver and the grant of equitable relief.

Although the primary object of the Fourteenth Amendment to the Constitution of the United States was to guarantee complete freedom to the recently-emancipated colored people, it also gave to the federal courts the power to declare invalid all state laws and decisions abridging the rights of citizens, or denying to them the benefit of due process of law.

A decision rendering invalid a state law was asked for in *Holden v. Hardy*, 18 Sup. Ct. Rep. 383, where the state of Utah had passed a statute that no person should require more than eight hours' work per day from any employee engaged in a mine, or in the smelting, reduction, or refining of ores or metal. The constitutionality of this law was denied upon the ground of class legislation, denial of freedom of right to contract, and abridgement of the privileges of a

citizen, depriving him of the equal protection of the laws, and of his property and liberty without due process of law.

The correctness of the decisions of many of the states, that they have no power to restrict generally the hours of labor, is not denied by the Supreme Court; but it holds that this application comes within the right to provide for the health and safety of employees, being a valid exercise of the police power of the state. It very aptly decides that, if a state has the power, always heretofore recognized, to determine what safeguards shall be thrown about the lives of its citizens, as regards mechanical contrivances, it certainly can make such reasonable provisions as are necessary for the protection of their health.

## RECENT CASES.

## CONTRACTS.

*Insurance Policy—Notice of Cancellation—Return of Premium.*—*Backus et al., v. Exchange Fire Insurance Co. of City of New York*, 49 N. Y. Supp. 677. By the terms of an insurance policy it was provided that it could be cancelled at any time by the insurance company giving five days' notice of such cancellation, and when so cancelled, if the premium thereon had been paid, the unearned portion would be returned on the surrender of the policy. *Held*, that the payment of such unearned portion was not a prerequisite to the cancellation of the policy, if the insurance company offered to return the same on demand and surrender of policy in its notice of cancellation. *Waltheur v. Ins. Co.*, 2 App. Div. 330. *Tritch v. Ins. Co.*, 152 N. Y. 635 distinguished.

*Inn Keepers—Extent of Liability for Lost Goods.*—*Amey v. Winchester*, 39 Atl. Rep. (N. H.) 487. Plaintiff attended a banquet at a hotel, where he registered and was assigned a room. Upon leaving the dining-room his hat was missing. *Held*, that the inn keeper was not liable. The mere registration and assignment put him in no different position than if he had registered and obtained a room elsewhere.

*Pledge—What Constitutes.*—*Matthewson v. Caldwell*, 52 Pac. Rep. (Kan.) 104. Certain collateral notes were set apart from others of a like kind as pledges, were placed in a package indorsed with a memorandum of the terms of the pledge, were pointed out to pledgee, and put in the vault of a bank where the pledgee and her husband, who was also one of the pledgors, had other securities. The deposit of the pledge was made by the husband, to whom it had been delivered as agent of the wife and in her presence, the nature of the transaction having been previously explained to her, and her assent thereto secured. The bank clerk to whom the notes were intrusted was instructed, pledgee assenting, to take special charge of them, and substitute other notes in place of such as might thereafter be paid. *Held*, a valid pledge, there being such a change of possession as to constitute a valid delivery, even though the pledgors had access to the place where the pledge was kept, and could have violated the terms of the pledge. The court attempts to distinguish the case from the very similar one of *Casey v. Cavaroc*, 96 U. S. 467, on the ground that in the latter case there was no memorandum or other distinguishing mark on the pledge, nor any such assent by the pledgee as to cause a novation, as in the present case.

*Contract—Beneficial Interest of Third Party.*—*Thomas Mfg. Co. v. Prather*, 44 S. W. Rep (Ark.) 218. Defendant company had entered into a contract by which it bound itself to furnish medical attendance to one of its employees, in case he should be injured while in its employ. The employee, on being so injured, engaged the services of plaintiff as his physician, with the full knowledge and approval of defendant. *Held*, Bunn, C. J., dissenting,

that plaintiff was not entitled to recover the value of his services from defendant, because of any contract implied from defendant's knowledge, plaintiff having testified that he would have rendered the services regardless of the facts that defendant would have been liable.

EVIDENCE.

*Notes—Conditional Delivery—Parol Evidence—Statute of Frauds.—Hurt v. Ford, et al., 44 S. W. Rep. (Mo.) 228. Held, where defendant's agent delivered the note of defendant to plaintiff, parol evidence is inadmissible to show that the agent was instructed not to deliver the note until he had procured another signature to it, and that these facts were known to plaintiff. The opinion considers such a transaction as an attempt to deliver the note in escrow; and, whatever may be the law elsewhere, that it is well settled in this State that it cannot be done by delivery to the obligee, but may be to a third party. Barclay, C. J., and Macfarlane, J., dissenting, assert, however, that not only are the opinions in other States conflicting on the point of conditional delivery to the payee, but that there is a want of harmony in the decisions in Missouri. They cite as especial authority for their view of the transaction, Burke v. Delaney, 153 U. S. 234, 14 Sup. Ct. 816; approved in Michels v. Olmstead, 157 U. S. 198, 15 Sup. Ct. 580.*

*Evidence—Privileged Communications.—Morton v. Smith, et al., 44 S. W. Rep. (Tex.) 683. One who is employed as stenographer and clerk in an attorney's office is not prohibited from testifying to statements he overheard made by a party to an action to the attorney. The privilege extends only to the attorney and persons who are the media of communication between client and attorney.*

TRIAL.

*Abatement—Another Action Pending.—Wilson v. Milliken, 44 S. W. Rep. (Ky.) 660. The pendency of an action in a United States court is ground for a plea in abatement in a subsequent action in a State court in the same district, where the parties and subject matter are the same, and the relief sought is also the same. The statements to the contrary in Gordon v. Gilfoil, 99 U. S. 169; and Stanton v. Embrey, 93 U. S. 554, are considered by the court as mere dicta, which have been mistakenly followed by such cases as Pierce v. Feagans, 39 Fed. 587; and Kilpatrick v. Railroad Co., 38 Neb. 620, 57 N. W. 664. Du Relle, J., dissenting, denies that these statements are dicta, and asserts that such cases as Radford v. Folsom, 14 Fed. 97, which is approved by the majority in this case, have since been overruled.*

*Remarks of Judge—Error Without Prejudice.—Klinker v. Third Ave. R. Co., 49 N. Y. Supp. 793. During the trial of the case defendant's counsel moved for an adjournment, whereupon the court said: "This is simply trying to fool, to hoodwink the jury; that is all." In charging the jury, the court, to rectify the error, said: "Whatever has been said in regard to the matter by counsel on either side, or by myself, is withdrawn entirely from your consideration, including the remark that it was mere hoodwinking the jury." Held,*



there was no error, as the latter statement operated to remedy the evil occasioned by the objectionable remark of the judge. *Cheesebrough v. Conover*, 140 N. Y. 382.

*Trial—Failure to Examine Witness—Presumptions—Argument of Counsel.*—*Western and A. R. Co. v. Morrison*, 29 S. E. (Ga.) 104. In the trial of an action against a railway company for damages for personal injuries, the evidence was contradictory as to the company's alleged negligence. The company, although it had other witnesses, failed to introduce and examine one employee, a fireman, who was present at the time and place the injuries were sustained, and who was then present in court. *Held*, that it was legitimate for the opposing counsel to argue to the jury that the failure of the company to so introduce and examine the employee was a circumstance from which the jury could draw an inference that if he had been examined, he would have testified as to matter prejudicial to the company. This was held to be so even though the defendant's counsel had caused the employee in question to be present in court that he might be examined by the plaintiff if he so desired, and had so informed the plaintiff's counsel. But the court said the plaintiff could not be then compelled to introduce an adverse witness, and that his failure in this respect was no excuse for the defendant. Simmons, C. J., in a very exhaustive opinion, dissented, mainly upon the ground that as a general rule it is the privilege of a party to rest his case upon such evidence only as he may deem proper and expedient to offer in his behalf; that all the law requires is sufficient proof, *Jackson v. State*, 77 Ala., 25; and that no unfavorable inference or presumption could arise from mere failure to examine a witness, and that such failure was not legitimate matter for comment by counsel.

## INJUNCTION.

*Injunction—Suit by Taxpayer.*—*Kittinger v. Buffalo Traction Co.* 49 N. Y. Supp. 713. An action by a taxpayer will not lie to annul the acts of the legislature and of the municipal authorities granting to a corporation the right to construct surface railroads in public streets, and to enjoin the municipal officials and the corporation from proceeding further. Such authority is within the legitimate exercise of the power to regulate public rights for public uses unless fraud existed or unless such acts would cause an injury to municipal property. *Potter v. Collis*, 19 App. Div. 392, 46 N. Y. Supp. 471. Ward, J. dissented, on the ground that where corrupt, wrongful and illegal action is the basis of the cause of action, it is maintainable.

*Receivers—Injunction.*—*Sternberg et al. v. Wolff et al.*, 39 Atl. Rep. (N. J.) 396. Plaintiff and wife and defendant and wife formed a corporation for the transaction of the clothing business, the shares being equally divided between the two families. According to the by-laws the whole number of directors was necessary to constitute a quorum and the four persons above named were elected directors. Difficulties and dissensions arising, the management of the business by the board of directors was in a dead-lock, although the company was doing a successful business. A bill was filed by plaintiff to restrain the defendant from exercising the duties of treasurer (no mismanagement however being proved), with a further prayer that, if necessary, a receiver might be

appointed to take charge of said company and manage the same, pending the decision of the suit. *Held*, that an injunction was impracticable and that a receiver *pendente lite* should be appointed.

# CARRIERS.

*Carriers—Mileage—Issue on Conditions—Consideration of Contract.*—*Corcoran v. N. Y. C. & H. R. R. Co.*, 49 N. Y. Supp. 701. The statute provided that railroad companies should issue 1000-mile mileage books at two cents per mile, and declared a forfeiture of \$50 to the person to whom a railroad company should refuse to issue such book. The contract which defendant company required purchasers to sign on the mileage books read in part as follows: "It is only good for passage on the train when presented to the conductor with a passage ticket which had been received in exchange for the coupons which have been detached from this book." The passage ticket given in exchange for such coupons is subject to all the conditions in this contract, being good only for one continuous passage within the time named therein, and no stop-over will be allowed." The plaintiff boarded a train of the defendant company without procuring such passage ticket and offered it to the conductor. Upon the latter's refusal to accept it and demand for ticket or price of the same and plaintiff's subsequent refusal, plaintiff was forcibly ejected from the train. In an action to recover under the statute plaintiff contended that by force of the statute the conductor was bound to accept the mileage book, and that the contract was unauthorized by statute. *Held*, one judge dissenting, such contention good, there being no consideration for the contract. The performance of that which a party was under a previous legal, valid obligation to perform is not a sufficient consideration for a new contract. *Vanderbill v. Schreyer*, 91 N. Y. 392, 401.

*Carrier—Duty to Passenger at Depot.*—*Wells v. N. Y. C. & H. R. R. Co.*, 49 N. Y. Supp. 510. In an action to recover damages for the death of plaintiff's intestate, her husband, it appeared that the deceased, upon showing his ticket to the gateman, was told to sit down, and that he would be notified when his train arrived. He therefore took a seat in the waiting room. Soon after it was noticed that he was ill and did not recognize acquaintances. The train had meanwhile arrived and departed without the deceased being notified. When the gateman noticed that he had failed to notify the deceased, and that he was in a sick condition, he instructed the policeman to put him out of the depot. The deceased was taken out, and wandering upon defendant's tracks was killed. *Held*, that the relation of carrier and passenger existed, and that under the circumstances defendant's employees were guilty of such negligence as to render the company liable. The question as to whether the condition of deceased was such that defendant might have refused to receive him as a passenger is not involved, as it did receive him as such. In case he was found, after he became a passenger, to be too ill to travel in safety, it was the duty of the defendant not to undertake to carry him, but to put him in a place of safety.

# BANKS AND BANKING.

*Banks—Checks—Insane Persons.*—*American Trust and Banking Co. v. Boone*, 29 S. E. Rep. (Ga.) 182. The check of a person lawfully adjudged insane *held*, to be absolutely void and that the bank paying it did so at its peril

even though the fact the maker was insane was unknown to the bank at the time of payment, and that he had been adjudged insane by a court of foreign jurisdiction.

*Banks and Banking—Failure to Return Draft—Liability of Bank.*—*Kirkham v. Bank of America*, 49 N. Y. Supp. 767. Plaintiff, a regular depositor, deposited with defendant a draft on a foreign bank for collection. Defendant forwarded it to its agent where the drawee was located, for collection. The drawee gave as payment a sight draft upon its correspondent in another city. Upon receipt of such information from its agent, defendant credited plaintiff with the proceeds of the draft, and notified him to that effect. On presentation of the sight draft, payment was refused. About a month afterwards, defendant notified plaintiff that the credit given him on the draft was canceled. Plaintiff demanded the return of the draft. *Held*, that defendant was liable upon failure to return the draft, properly protested, or the amount therefor. *Bank v. Ashworth*, 16 Atl. Rep. 596. Patterson, J., dissents.

#### MISCELLANEOUS.

*Replevin—Verdict and Judgment—Fixing Value of Each Article—Arrest of Judgment.*—*Byrne v. Lynn*, 44 S. W. Rep. (Tex.) 311. In replevin for property described as a bar, counter, and ice chest, of the value of \$900, and whiskey, of the value of \$108, *held*, defendant was not entitled to have judgment arrested because the jury rendered a verdict which failed to find the separate value of each article, there having been no evidence tending to show such separate value. Compare, however, *Blakely's Adm'r. v. Duncan*, 4 Tex. 185; *Hooser v. Kraeka*, 29 Tex. 450; *Cole v. Crawford*, 69 Tex. 124. 5 S. W. 646, which the court attempts to distinguish from the present case. See also, *Blake v. Powell*, 26 Kan. 320; *Hanf v. Ford*, 37 Ark. 545.

*Negligence of Parent—When not Imputed to Child.*—*Kowalski v. Chicago G. W. Ry. Co.*, 84 Fed. 586. The contributory negligence of a father, as the driver of a wagon, in causing a collision with defendant's train is not imputable to his infant child, who was in the wagon with him at the time, so as to prevent the child from recovering for injuries received. The case of *Thorogood v. Bryan*, 8 C. B. 115, and cases in this country based thereon, holding the negligence of the driver to be imputable to the occupants of the vehicle is no longer of force in this country. Since *Little v. Hackett*, 116 U. S. 366, 9 Sup. Ct. 391, it has been generally held that there is no legal identity between the driver of the vehicle and those occupying it as passengers or upon invitation of the driver. Upon principle, the fact that the person injured was also the infant child of the driver cannot alter the case.

*Wills—Construction—Description of Property—Stock.*—*Capehart et al., v. Burrus et al.*, 29 S. E. Rep. (N. C.) 97. A testator, after giving his wife several tracts of land, two horses, two cows, and other personalty, and a tract of land to each of several children, in a separate paragraph of the will, declared that "all my notes, bonds, stock, and money on hand I wish divided between my wife," and children named. *Held*, that the word "stock" should be construed by association with the other words used as meaning bonds and

evidence of shares in corporations, and not live stock; and that the fact the testator had no "stock" securities at the time of making the will, nor at his death, but had a large amount of live stock, could not be considered in determining the meaning of the word "stock" as used, such facts not appearing in the will. Clark, J. (Faircloth, C. J., concurring), dissenting, held that in arriving at the testator's intention it was just and natural to conclude that he intended to divide the kind of stock that he had (*Clark v. Atkin*, 90 N. C. 629); and that for this purpose it was also proper to consider the condition of the testator's family and estate, and the kind and extent of property he owned at the time of making the will (*Lassiter v. Wood*, 63 N. C. 360).

## BOOK REVIEWS.

*The Law of Wills.* By Melville M. Bigelow, editor of "Sixth American Edition of Jarman on Wills." Cloth, pages xxxii, 398. Little, Brown, & Company, Boston. 1898.

A good text-book for students on Wills has been supplied. Mr. Bigelow here combines the results of his experience in teaching with his researches in the law of wills. His book therefore is accurate and clear. He believes in developing his subject theoretically and then illustrating it by the rulings, even if sometimes mistaken, of the courts. A thorough discussion of an erroneous decision gives greater thinking power to the student than a statement of the rulings in a dozen correct ones; and this thorough discussion can be carried on intelligently only after a good understanding of the theory. Mr. Bigelow always has his point of view and in leading to it he does not raise such a cloud of ambiguity as to bewilder his followers. The chapters on construction are the clearest and most logical statement of that subject that we have seen. The book is comparatively small, but we believe its use will confirm our experience, that the amount that the student absorbs is in inverse proportion to the size of his text-book.

We suggest that, in view of the definition of remainders, which American text-books give, the subject is not sufficiently developed in the chapter on "Executory Gifts." Also the illustration at the bottom of page 351 seems incomplete.

*A Treatise on the Law of Easements.* By Leonard A. Jones, author of the "Law of Mortgages," etc. Sheep, pages lxii., 768. Baker, Voorhis & Company, New York. 1898.

This volume, while complete in itself, is a continuation of Mr. Jones' "Law of Real Property." His books are eminently practical, and are written for the practicing lawyer. Accordingly the discussion of rights of way, the topic in easements which is of most frequent occurrence and of greatest importance, occupies a full third of the volume. Some five thousand cases are cited, and those on leading points are grouped in the foot notes by States. It is to be hoped that Mr. Jones will carry out his project of writing on other subjects in Real Property.

*Law Latin.* By E. Hilton Jackson, LL.M., Instructor in Law and Law-Latin in the Summer School of the Columbian University. Sheep, pages xiv., 219. John Byrne & Company, Washington, D. C. 1897.

A knowledge of Latin is more and more being required for admission to law schools. The Yale Law School makes it a condition

to admission to its next class. While "Law Latin" would not fit one for reading literary Latin, it would be of great service to one wishing to understand the terms and phrases met with in law books. The author has laid out an elementary course in the language making the maxims in common use the foundation of the translation and composition work. Thus the learner kills two birds with one stone. Indeed, the book's object is the thorough understanding of the maxims, and the application of three hundred and eighty-five of them is explained in a terse and perspicuous manner. "Law Latin" is a novel and interesting book.

*Cases on the Law of Partnership.* By Francis M. Burdick, Dwight Professor of Law in Columbia University School of Law. Cloth, pages xi., 691. Little, Brown, & Company, Boston. 1898.

Since the development of the "case" system of teaching law the publishers of the Students' Series have issued volumes of selected cases on the subjects covered by that series. This is the latest and covers partnership and limited partnership. The thanks of law students are due to Little, Brown, & Company for the learned men whom they have secured to write, and the high grade of excellence which the Students' Series has maintained.

*Probate Reports Annotated.* Edited by Frank S. Rice. Volume II. Sheep, pages xix., 755. Baker, Voorhis & Co., New York. 1898.

This is the second of a series in which Mr. Rice collects the latest and best decisions on estates. The present volume contains extensive notes on the timely subjects of "Collateral Inheritance Tax," "Spendthrift Trusts," "Extent of an Executor's Liability," etc. It is difficult to see, however, what special relation the notes on "Leading Questions" and "Due Process of Law" bear to probate law.

## MAGAZINE NOTICES.

The following are some of the leading articles appearing in late legal publications:

*Albany Law Journal:*

<i>March 19.</i>	Wilful Negligence, . . . . .	L. D. Landrum
<i>26.</i>	Respect for Law, . . . . .	P. L. Edwards
<i>April 2.</i>	Expert Evidence from the Standpoint of a Witness, . . . . .	F. X. Dercum

*Central Law Journal:*

<i>March 11.</i>	Title Notes, . . . . .	A. M. Sturdevant
<i>18.</i>	The Action of Malicious Prosecution, . . . . .	D. B. Van Syckel
<i>25.</i>	Woman's Right to Hold Office, . . . . .	J. A. Webb
<i>April 1.</i>	Movable and Immovable Fixtures, . . . . .	W. C. Rodgers
<i>8.</i>	Has a Check Holder a Right of Action Against a Bank for Refusal to Pay Same? . . . . .	C. H. Tenney

*The Green Bag—April:*

The Power of Removal From Federal Offices, . . . . .	J. W. Stillman
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*American Law Review—March-April:*

The Legal Relations Between Bench and Bar, . . . . .	A. E. Pillsbury
The Leutgert Case, . . . . .	J. H. Wigmore
Power of the President to Sign Bills, . . . . .	E. I. Renick
The Rights, Duties and Liabilities of Bicyclists, . . . . .	W. C. Rodgers
Some Recent Massachusetts Decisions in Partnership, . . . . .	L. M. Friedman

*The American Law Register—March:*

What Constitutes a Partnership? . . . . .	G. W. Pepper
Limitations of Municipal Ownership in Pennsylvania, . . . . .	W. D. Crocker

*New Jersey Law Journal—April:*

What Constitutes a Book of Original Entry? . . . . .	W. D. Seddon
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*Harvard Law Review—April:*

Government by Injunction, . . . . .	C. N. Gregory
Insurance of Limited Interests Against Fire, . . . . .	Emlin McClain
The Federal Contract Labor Law, . . . . .	P. F. Hall
The Creation and Transfer of Shares in Incorporated Joint-Stock Companies, . . . . .	C. C. Langdell

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## THE BAR OF THE CITY OF NEW YORK.

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The New York City Bar was a strong one even before the Revolution, but it was not until after the achievement of independence that Alexander Hamilton and Aaron Burr became conspicuous in this island for their genius as advocates and their power and learning as lawyers. Both had been liberally educated and both had been thoroughly grounded in the common law. Probably Hamilton had the wider and more comprehensive intellect; Burr the more perceptive and subtle. True it is, that they were pitted against each other in almost every great cause before the courts in the State of New York for many years after the evacuation of the city by the British armies.

Hamilton, I have been told, was born in the West Indies. He came to America when quite a youth and became the military Secretary and Aid-de-camp of General Washington. It was while in attendance upon the "Father of his country" that he became acquainted with Miss Elizabeth Schuyler of Albany, the daughter of General Schuyler. Miss Schuyler became Mrs. General Hamilton.

These two rivals—Hamilton and Burr—cordially hated each other and however exalted the character of Hamilton he was capable of the feeling of vindictiveness. It is claimed, and with some force of authority, that Hamilton had secretly slandered Burr in the columns of a Federalist newspaper for many years; that he had secretly, insidiously and yet effectively thwarted Burr's ambition, and when the secret was revealed that his supposed friend had been his concealed foe and had been more or less the architect of his political ruin, then, undoubtedly, rose in the soul of Burr a determination to destroy his adversary.

Their meeting at Weehawken is historical; it is known of all men and I fail to see that any greater moral guilt justly attaches



to the name of Burr than to that of Hamilton growing out of the circumstances of this duel. However, public impressions aided by the death of Hamilton, who was immensely strong in popular sentiment, turned the scale against Burr and he became a wanderer and fugitive on the face of the earth.

As a lawyer, probably Hamilton comprehended general principles with more tenacity of grasp than did Burr; probably Burr was the superior case-lawyer and his knowledge of precedents was more comprehensive and accurate. Certainly in the conduct of a *nisi prius* cause Burr was the better cross-examiner and was better enabled by his nature, character and disposition to make effective appeals to the jury. In his examination of witnesses his knowledge of human nature came greatly to his aid. Burr's knowledge of real property was varied, comprehensive and accurate; he won great distinction in ejectment suits and probably no man ever lived in this country who was his superior in the trial and argument of actions which involved title to real property.

Hamilton was a constitutional lawyer. He drank in the philosophy, the history and reason of the law at the fountain head of their origin and it was before the court in banc that his decided superiority to Burr was manifest. What might have been the future of Hamilton at the bar had he lived, or that of Burr if he had not been driven into exile, can only be left to conjecture. That they were confessedly the two great men of their generation at the bar, not only in the State of New York but in the entire country, is made manifest by history.

It must be remembered that at the meridian of their glory Daniel Webster, Jeremiah Mason and Rufus Choate had not appeared.

Mr. Webster was *sui generis*. No man who has appeared in the legal or political history of this country can be compared to him.

Probably Jeremiah Mason was, take him all in all, his greatest antagonist.

As an advocate Rufus Choate has never had a peer in any country or in any age. Ogden Hoffman approaches him more closely than any other.

Mr. Hoffman was born in the City of New York on the 3d day of May, 1793. His father was Josiah Ogden Hoffman at times the associate and often the opponent of such lawyers as Hamilton, Kent, Ambrose Spencer, Thomas Addis Emmet and men of that calibre, jurists of whom it has been said "that a

profound and high order of eloquence raised them to the sphere of the Pitts, Burkes, Sheridans and Currans." Mr. Hoffman as a boy entered the service of the United States as a midshipman on board the Frigate "President" and he was with Commodore Decatur when that great sailor hoisted the flag of his country in the Eastern seas. Mr. Hoffman was present at many of the engagements with the Algerine Pirates and was especially noticed by his commander for his personal gallantry and loyalty to duty. He left the Navy and studied for the bar. He was encouraged in his acquisition of general information by the advice of his eminent father who said, "that no man can be thoroughly acquainted with any one branch of knowledge without having some skill in others; also, that to no department is general knowledge so necessary as in the science of Jurisprudence which pushes its roots into all the grounds of science, and spreads its branches into every object that concerns mankind. He who expects to be eminent at the Bar depending simply on a knowledge of law, is like a general with an army consisting entirely of infantry without artillery or cavalry. Language is the armory of the human mind and at once contains the trophies of the past and the weapons of its future conquerors."

On his entry into practice Mr. Hoffman confronted a formidable bar, and among its members were James W. Gerard, Hugh Maxwell, Hiram Ketchum, Henry Wheaton and others of the same mental grade. The general impression has come down to this generation that Mr. Hoffman was simply a criminal lawyer. No greater error can be conceived. He appeared as leading counsel in some of the most difficult cases involving the most intricate legal questions ever tried at the New York Bar. As to his abilities before the Court in banc the reported cases in which he appeared as counsel and which were adjudicated in the Supreme Court, Court of Errors, and Court of Appeals, bear ample testimony. Still, it was Mr. Hoffman who gave to Mr. Evarts, then a rising star at the bar, the following counsel: "Take my advice, adhere to civil business and let the Criminal Courts alone." Mr. Evarts puts the speaking chisel into the marble of Mr. Hoffman's character when he describes him: "A very able lawyer, and I mean it in the sense that every lawyer is able if he be able at all. He was able to the time, the occasion and effect. He had embodied, digested and assimilated to himself the great principles of the law and reasoning that make up the character of the lawyer."

Mr. Hoffman himself, in speaking of Thomas Addis Emmet,

one of his greatest adversaries, paid him the following beautiful tribute: "Listening to him you were struck with his power. He seems like a piece of immense machinery moving with the greatest regularity and smoothness, and yet as if restraining its gigantic power."

Probably in the history of criminal jurisprudence no more miraculous triumph was ever achieved by any advocate than was won by Mr. Hoffman in what is known as the "Helen Jewett case." Helen Jewett was one of an unfortunate sisterhood. Her true name was Dorcas Doyen, and she was born in the State of Maine. She was a woman of marvelous personal beauty; of some intellectual culture and of the most consummate fascination. At the time of the tragedy which invoked the powers of Hoffman in defense of the criminal, she resided at the house of Mrs. Townsend in the Fifth Ward in the City of New York. At this place Robinson often resorted for the purpose of meeting the woman whose charms had fascinated his life and blighted his career.

It was contended by the prosecution in its opening that early on the morning of April 10, 1836, the body of the fair cyprian was discovered in a terribly mangled condition in her room at the residence of Mrs. Townsend; that between eight and nine o'clock in the evening previous Robinson came to Mrs. Townsend's and requested to see Miss Jewett. He wore a cloak which at the time was a fashionable one, and while inquiring for Miss Jewett he leaned against the wall in the hall so that the servant who came to the door in answer to his ring had a perfect view of his face.

The unfortunate woman, Helen Jewett, was at this time in the back parlor of the house but, hearing her name mentioned came out into the hall. As she reached the hall the man was then ascending the stairs which led to the upper part of the house and to her room; she closely followed him and, as she approached the visitor, exclaimed: "My dear Frank! How glad I am that you have come." That both then went up stairs and retired and were not seen again until eleven o'clock.

At that hour Miss Jewett came to Mrs. Townsend and asked for a bottle of champagne. After some little delay the wine was taken to Miss Jewett's apartment and the attendant who conveyed it again saw Robinson, who was holding a candle and reading a book. From that moment until the discovery of the homicide, no person outside of the assassin ever saw Helen Jewett alive.

It appeared that this temple of the passions was closed at a little after twelve o'clock. In the course of the night some one called out to Mrs. Townsend to be let out. She made no response and the demand was not repeated, but very early in the morning on going to Helen Jewett's room and opening it Mrs. Townsend perceived a great quantity of smoke which poured out of the room. The alarm was given and a policeman entered, extinguished the fire and discovered the body of the unfortunate woman, Miss Jewett, terribly mangled as if with some sharp instrument. A search in the back yard of the house, revealed a hatchet covered with blood and in the yard adjoining that of Mrs. Townsend, Robinson's cloak was found. A piece of twine was attached to the hatchet and another piece, corresponding with that on the hatchet, was found tied to the cloak. The theory of the prosecution was that the hatchet had been tied to the inside of the cloak by the twine and thus concealed. It was conspicuously clear that the man who left the cloak and hatchet must have escaped over the fence between the two yards. The fence was covered with a heavy coat of whitewash.

A search was made for Robinson. He was found at his lodging and it was discovered that his pantaloons were marked with lime, indicating, as the prosecution contended, his contact with the fence in the rear of Mrs. Townsend's residence.

Robinson was a young man of good family antecedents, and until his unfortunate connection with the murdered courtesan had always sustained a good character in the community. His age was only twenty-two years; his business that of a clerk in a wholesale dry-goods house. There was no controversy that his relations with Miss Jewett had been of the most intimate character, and the motive for the murder, that the prosecution sought to establish, was that the unfortunate Helen Jewett was jealous of the attentions of Robinson to a young lady to whom, it was said, Robinson was about to be married, and that this sentiment of jealousy engendered contradictions and quarrels between the two, and that Robinson resolved to remove from his path the obstacle which he seemed to think existed in it, in the person of Helen Jewett.

It can be clearly understood from this summary of facts that the excitement in the community was all-pervading and the greatest interest was centered in the trial of Robinson, who was defended by Mr. Hoffman and Mr. Price.

It was in this great trial that Mr. Hoffman's indomitable genius and eloquence burst forth once more in all their brill-

iancy. He made the leading argument for the defense and during its progress the jury became captives to his wit, logic and pathos. Although he assailed a fabric of proof most powerful in its character and of the strongest circumstantial nature, he pounded it to pieces with the artillery of his great abilities and the jury acquitted his client in the face of what must ever seem to be a record of the most convincing guilt.

Mr. Hoffman was gifted with a most remarkable voice. It was as sweet as music, and in one trial in which he was engaged after he had spoken for about an hour, he closed his argument to the jury, and thereupon one of the panel, almost unconsciously, rose in his place and requested "Mr. Hoffman to speak a little longer." This is one of the most conspicuous tributes ever paid to the influence of an orator over a jury.

The case which most resembles that of Robinson, who was charged with the murder of Helen Jewett, was that of the "*Commonwealth of Massachusetts v. Albert J. Tyrrell*." The accused was defended by Rufus Choate. He was charged, as I remembered to have read, with the murder of Maria Bickford in a maison de joie. In that case, as in the Helen Jewett murder, the dual crime of homicide and arson was committed. Tyrrell after assassinating the unfortunate victim of his passion, set fire to the room in which her dead body lay, for the purpose, undoubtedly, of concealing the character of the crime which had been committed. In his case also, if I recollect correctly, one means of detection and identification was his cloak which was found in and about the premises where the homicide had been committed.

Mr. Choate conceded that the accused was guilty of both murder and arson, but contended that at the time the crime was consummated he was in a somnambulistic state and was therefore legally and morally irresponsible for his offense and such was his controlling power over the jury that he convinced them of the truth of his theory and they brought in a verdict of "not guilty."

It is said that the presiding Judge was so taken by surprise at the result that, momentarily forgetting his judicial reticence and caution, he put the question to the jury: "Gentlemen, how could you find such a verdict as that?" The foreman's reply was: "Mr. Choate said that it was all right."

I presume none will question the assertion that for the last quarter of a century Mr. Evarts has been the leader of the American bar. He has now substantially retired from active

practice and his place is fully filled by Joseph H. Choate. Mr. Evarts is a New Englander by birth, born in Boston, I believe, and is a descendant of that original family stock which has produced such lawyers as Roger Sherman, Roger S. Baldwin and the Hoars of Massachusetts. General Sherman was also, I believe, a near connection. In appearance Mr. Evarts is one of Plutarch's men. In physiognomy and phrenology he presents a strong resemblance to Cæsar, the great Roman. Possibly, if not quite equal to Webster, Mason and Luther Martin, he is certainly in their class and that class is the first. He is a more learned man than was Jeremiah Mason. He is a more sagacious and conservative man than was Luther Martin, although the latter, from all that we can glean of his professional history, but for the unfortunate infirmity of drink, would have been the first among lawyers. His defense of Aaron Burr was a mighty tribute to the genius, the learning, eloquence and literature of the bar. And how sad is the reflection that one so greatly gifted by the Almighty as Martin, chartered by the Deity to achieve all that intellect and genius could conquer, made so woeful a misuse of his mental treasures and miserably ended in the last steps of his journey.

Mr. Evarts settled in New York, and it can be truly said that from the commencement he was the Titan of our bar. His learning seems exhaustless; his mind is enriched by the widest and most varied reading, and his intellect is the arsenal which holds the most effective mental weapons. I have been told by distinguished men who know him well, that it is very difficult to distinguish where his powers are best developed; whether before a jury, the court, or as a statesman and a popular speaker. His sentences, as long as those of Rufus Choate, do not burn with the fervid fire and oriental imagination which made the great Massachusetts lawyer the wizard of all time.

A trial that invoked all of Mr. Evarts great powers, was that of *Tilton v. Beecher*. Beecher was known over the habitable globe. He had enriched the English language with thought and expression. His heart beat for the slave and he had aided in his emancipation. He was a character of power, gentleness and beauty, and his influence as a man and a minister of the gospel was positive and controlling; and still this man was involved in a litigation and subjected to the analysis of charges which compel us to realize the felicity and truth of the language of Hugo: "Our joys are shaded. The perfect smile belongs to God alone."

My own inquiry, based upon what I have read of the evidence in this case, has caused me to believe that the evidence in favor of Mr. Beecher's guilt is not so strong as the testimony tending to establish his innocence.

There can be little doubt that the plaintiff, Tilton, was not only anxious to realize in a material sense from the result of the trial, but that his wish was to destroy a great character. Tilton, though a man of ability in some directions, was in comparison to Beecher a mental Lilliputian. He undoubtedly envied the abilities, position, success and grand career of the Brooklyn minister. He realizes the truth of what is so aptly said in the Holy Scriptures: "Wrath is cruel, anger is outrageous, but who can stand before envy." This sentiment has probably contributed more than any other to the moral destruction of the race.

There were but two real supports to the charge that was made against Mr. Beecher—of immoral behavior with Mrs. Tilton—and those were the testimony of Moulton, and the evidence contained in certain letters of Mr. Beecher's which were considered by the friends of Mr. Tilton as conceding away the former's case.

Whether Moulton, the "mutual friend," was in any way, through the channel of ancestry or otherwise, connected as General Tracy charged, with a certain Judas Iscariot, who betrayed on a memorable occasion the Holy Redeemer, it is not necessary to inquire; one thing appears clear in the proof that while pretending to be the friend of both Mr. Beecher and Mr. Tilton, his acts were those of a foe to Mr. Beecher and his testimony was that of a strong friend and ally of Mr. Tilton, and therefore, except as corroborated, his testimony ought to have had little weight, and probably that was the view taken by the majority of the jury.

In one of Mr. Beecher's written effusions he says in substance to Tilton: "I bow before you as I do before my God." Those were substantially the words as I recollect them now; at any rate, they embodied the sentiment of a statement contained in a letter from Mr. Beecher to Mr. Tilton. Mr. Beecher had a very reasonable explanation and it was substantially that, he felt that as a friend of Tilton, and as a minister of Christ, it was his duty to have labored for the reconciliation of the husband and the wife who were estranged, and he recognized that in that respect he had substantially omitted to do his duty.

Considering the character of the man, his position, his min-

istry, and his relations with Mr. and Mrs. Tilton, this is by no means an argument without force, but it will ever be considered an undecided question, the guilt or innocence of Mr. Beecher. Probably the real fact will never be known in this world, but it is conceded by the profession that Mr. Evarts' effort in behalf of Mr. Beecher was a masterly, scholarly and eloquent one and that it had very much to do with the division of sentiment of the jury who were greatly impressed by the powerful address of W. A. Beach, which, on behalf of Mr. Tilton, followed the argument of Mr. Evarts.

Mr. Evarts' life has been one of unremitting professional and public toil. At the age of fifteen he entered the Freshman class of Yale College and four years later graduated with honors at the early age of nineteen. He pursued the study of the law in the Law School of Harvard University after which he entered the law office of Daniel Lord, one of the leaders of the New York Bar, and it was under his supervision that he prepared himself for admission to practice. Mr. Evarts has often acknowledged his indebtedness to the system pursued by Mr. Lord in his own education and to the discipline that eminent advocate insisted upon, and the sound principles of law which he instilled into his mind.

Mr. Evarts was admitted to practice in 1841, and from the moment of his admission, as has been stated, he at once went to the front in his profession and remained there ever afterwards.

His first public political office was that of Assistant United States District Attorney for the Southern District of New York, which he held for four years, and it was while in this position that his great capacity as a lawyer was first made manifest. During the second year of his official term an expedition was fitted out against the Island of Cuba; one of those revolutionary marauding adventures which at this time were quite common. The particular enterprise which attracted the adverse criticism and professional action of Mr. Evarts, was the one known as the "Cleopatra Expedition." There were a great many principles of international law involved in the controversy, but they were presented, surmounted and utilized in such a way that conviction of the principal offenders was inevitable and Mr. Evarts' reputation was very greatly enhanced.

He also argued the question of the constitutionality of the "Metropolitan-Police Act," so-called, passed in 1857, and he succeeded in upholding the law.



In 1860 he was retained by Mr. Chester A. Arthur, afterwards President of the United States, to argue what was called the "Lemmon Slave case."

It appears that Lemmon was the owner of a number of negro slaves and that he was en route from the State of Virginia, where he had a residence and where he claimed his domicile, to Texas. He intended to ship the slaves from the City of New York by boat to the "Lone Star State." At once, on their entering the jurisdiction of the State of New York, the friends of the slaves claimed that they were free and that their freedom could not be impaired by the provisions of any law of Congress relative to the rendition of slaves who were fugitives from bondage. In this important case the State of Virginia retained Charles O'Connor; the State of New York selected as its champion Mr. Evarts, and it is not too much to say, on the authority of those who heard the argument, that in this case Mr. Evarts demonstrated his mental, logical and legal superiority in no uncertain way.

It will not be forgotten that in 1865 the position was taken by several of the States of the Union that they had the right to tax the securities of the United States included in the investments of the National Banks. The banks resisted this contention and Mr. Evarts, as their counsel, presented the issue upon the unconstitutionality of the States' taxation. The judicial decision was in favor of the banks and of the position assumed by Mr. Evarts.

If Jefferson Davis had ever been brought to trial, which undoubtedly he ought to have been, Mr. Evarts would have conducted the prosecution on the part of the United States as leader. He was retained by the Attorney-General to conduct the case for the Government but the general amnesty of December 25, 1869, was conclusive of this prosecution.

It was in the State trial of the impeachment of President Johnson that Mr. Evarts' great powers shone forth with extraordinary lustre. He was among the counsel selected to defend the executive and his tact, ability, genius, resource and imagination as exhibited in this protracted struggle won for him the admiration of civilized mankind.

Mr. Evarts labors in behalf of the United States at the Geneva Conference can never be over-estimated nor forgotten. The purpose of this celebrated tribunal of arbitration was to determine the harassing question of the amount of damage done to the commerce of the United States by the so-called Confederate men-of-war on the high seas during the Rebellion.

Through the ability and persistence of and the respect inspired by Mr. Evarts, the position of the United States before that august tribunal was to a great extent conceded and allowed.

As is well-known, Mr. Evarts was for a short time Attorney-General, having been appointed by President Johnson, and he was also counsel for President Hayes before what was known as the "Electoral Commission," and on the inauguration of Mr. Hayes the latter nominated him for Secretary of State, and during his administration of that Department he had to consider and determine the vexed question of the "Fisheries," which had been in dispute between the United States and England for nearly three-quarters of a century. This question was very unsatisfactorily solved by the appointment of a Committee of Arbitration known legally and diplomatically as the "Fisheries Commission" at whose hands the United States suffered to the extent of an award of over five millions which she was compelled to pay to England. This unexpected result, however, was never charged to the indifference or want of capacity of Mr. Evarts.

Mr. Evarts was for six years a member of the Senate, representing in part the Empire State—New York—and his speeches in that body have become a part of the political wealth, history and literature of the United States.

As a lawyer he is in a group of which Webster, Fessenden, Luther Martin and Jeremiah Mason are members. There is but one man in the political, legal and professional history of the United States who towers above him, and that is Daniel "the Godlike."

William A. Beach, the greatest antagonist of Mr. Evarts in the *Tilton v. Beecher* trial, was born in Saratoga County in this State early in the present century. He and John K. Porter contested for nearly a quarter of a century the *nisi prius* supremacy in the Albany and Saratoga Circuits and so equally were they matched that an eminent lawyer who knew them both well once told me that "it depended altogether on which had the last say to the Jury, so far as the verdict was concerned." That, "If Gus Beach had the last talk to the jury as a rule he prevailed, but, if Porter had the opportunity to review the argument of Mr. Beach, he in turn was conqueror."

For fifty years Mr. Beach was one of the leaders of the *nisi prius* bar in this State, and when he removed to New York over a generation ago, he immediately took the rank in the Metropolis which his genius, abilities, prestige, success and experience entitled him to hold.

William A. Beach was a man of singular beauty of person and fascination and grace of manner. His courage was of the most exalted character, and I believe the man would have blushed at even the suggestion of fear. This heroic quality was best evidenced in his struggle during a long and doubtful day when the odds were preëminently against him; then it was instead of sinking discouraged at the feet of his adversary he rose superior to fortune and out of "the nettle danger plucked the flower safety." In the *Tilton v. Beecher* trial Mr. Beach, during the summing up, sternly reproved one of the jury for an act or utterance of manifest partiality. To most people this course of conduct would seem to evidence a want of tact, but in point of fact it was the bright, consummate flower of the highest art; because this identical juror, who before Mr. Beach's assault upon him, was adverse to Tilton, became one of his warmest adherents in the jury room. It was undoubtedly Mr. Beach's powerful presentation of the cause of Tilton that led to the division of sentiment in the jury box; because as I have taken occasion before to say, a careful, calm analysis of the testimony will convince most professional minds at least that the proof in the cause was strongly on the side of the Brooklyn minister.

Mr. Beach, spoke, I believe, six days in presenting the cause on the part of Mr. Tilton and it is conceded that his argument was one of the most complete, able and eloquent efforts ever made at the bar. It was enriched with historical incident, play of human passion and the bright rays of human fancy, pathos and wit. His denunciation of Mr. Beecher was most terrible and scorching, and while he gave full credit to his genius and recognized his great career, he lamented that like "Ichabod," he had fallen to rise no more.

Long will this battle of legal giants live in the history and the literature of the bar. Probably a gathering of more powerful lawyers never assembled at one time on this continent. Some of the principal actors in the drama have passed away, others are near the great hereafter, and nothing is left of this dramatic trial but a recollection, a throb of anguish and a tear of sorrow. Beecher himself is dead; he has long since appeared before a Judge who never errs; before whom all things are unrolled and seen, and nothing remains of him but the marble effigy which greets the eye of citizen and stranger in the city in which he lived, "amid the people whom he loved so well."

Mr. Beach's genius was a fertile and versatile one. He appeared as advocate in causes which necessitated a wide and

varied learning and which invoked the greatest ability and the most profound experience. He defended men on trial for their lives; he protected title to real property; he overthrew unjust wills and maintained just ones. He was at home in the technicalities and intricacies of commercial law and its practice, and of him it truly can be said as Dr. Johnson wrote of Goldsmith, "he touched no subject that he did not adorn."

He left us, and the generation of which he was the leader, has also left us, and we have nothing but scant enduring knowledge and recollection of this great legal athlete; this powerful gladiator of the pugilism of the law; this grand character, this brave and generous man, this true, loyal and constant friend; "this mightiest departed."

In reviewing the life and career of James T. Brady we realize the truth of the utterance which the foremost mind of all generations puts into the mouth of one of his grandest conceptions, "take him all in all I shall never look upon his like again."

For a generation Mr. Brady was the unchallenged leader of the New York Bar. I know there are many who contend that as a mere lawyer Charles O'Connor was his equal if not superior, but to this comparison I cannot assent. Undoubtedly, O'Connor was more of a case lawyer and was more familiar with the *technique* of the profession, but that he ever approached Mr. Brady as a *nisi prius* lawyer, I cannot be made to believe.

Mr. Brady's ancestors, as his name indicates, were Irish. His father was a very accomplished scholar and a remarkable linguist. He spoke fluently and correctly the language of many countries. His classical and belles-lettres-learning was the surprise and admiration of all who knew him. It was like that which Macaulay attributed to the celebrated Dr. Parr, "grand, massive and splendid."

When James became a student of the law, his father said to him: "James, the study of law is like scaling the Alps; you must adopt the indomitable energy of Hannibal and your ascent will be easy. Of all things beware of half knowledge; it begets pedantry and conceit. Make your learning practical, for a book-worm is a mere plodder and gossipier.

"There is a deal of legal learning that is dry, cold, dark and revolting, but it is an old feudal castle in perfect preservation which the legal architect who aspires to the first honors of his profession will delight to explore and learn all the uses to which the various parts are to be put and thus he will better understand and relish the progressive improvements of science in

modern times." Thus it will be seen that the father was an extraordinary man and was worthy of the son who cast such renown upon the name.

His love for his mother was so great, beautiful and pathetic that for years after she was dead and gone "her name was never mentioned in his presence without the tears coming into his eyes."

Mr. Brady had that sense of humor which really great men are rarely without. On his admission to the bar, his circumstances being humble, he took an office in a basement which had been recently vacated by an eminent cobbler. One of Mr. Brady's countrymen coming by the place noticed him sitting alone in what he termed his office, and with that sense of wit that is inherent and is part of the birthright of the Irish race, he inquired: "What is it do ye sell here?" "Blockheads," replied Brady. "By Jesus!" said the man from Erin, "You must be doing a great business, I see you have only one left." Mr. Brady used to tell this story laughing until the tears rolled down his cheeks.

One day he was trying a cause in the Superior Court before a very dull judge whose name was Payn. This judge did not compensate for his mediocrity by his industry. He used to adjourn promptly at three o'clock in the afternoon. On this occasion, as the clock indicated the hour, the judge said to Mr. Brady: "I think we have worked hard and long enough to-day; it is now three o'clock; let us adjourn." Mr. Brady's answer was, quick as the lightning flash, a quotation from the great poet, "We delight in the labor which physics 'pain'" (Payn). However, it is recorded that the judge carried his own motion for an adjournment.

Mr. Brady, on one occasion, was trying a cause against the celebrated Mr. Girard, an advocate who was noted for his ability, geniality, good nature and fascination of manner, in fact, Mr. Girard was termed "the forlorn hope of a desperate cause." In the course of the discussion as to the introduction or exclusion of some testimony, Mr. Brady in some heat drew a far-fetched illustration when he said: "Mr. Girard, you have as much right to put that question as I have to go into your house at one o'clock in the morning." "Very glad; always glad to see you at any time, Mr. Brady," said Mr. Girard.

Probably no advocate ever lived who had so great an empire over the human heart as Mr. Brady. Everybody loved him and his eloquence and pathos in a noted trial were very affecting.

In my boyhood I have seen juries weep and laugh by turns as this great master of the human mind and heart painted as in a moving panorama before them the strength, the beauty and justice of his cause.

I remember a great many years ago when I was a student at law in the office of John W. Ashmead, himself a very eminent lawyer, that I desired very much to hear Mr. Brady sum up in the celebrated "John Kane case." This was a case where the defendant was charged with the crime of arson. He had several trials but was finally, I believe, acquitted. On the occasion I refer to I went over early to the Court Building and stationed myself at the door where counsel entered the court room, thinking that if I went early I would get an opportunity of hearing the great advocate of whom I had heard so much. As I stood at the door he came along walking with that free, buoyant step so characteristic of him, and holding in his hand, if I remember, a green bag; his face a poem lighted up with all the benevolence, and I may say without sacrilege, divinity of his nature. He caught sight of me standing at the door and undoubtedly reading my desire in my face, he said to me: "My boy, would you like to go in and hear the trial?" I told him that was the desire which had brought me there. Said he, with the air of one talking to an equal: "Come in then; come with me," and he took me by the arm and piloted me to a seat at the counsel table near himself, and there for hours I sat speechless, my eyes and ears open and my mouth agape, listening to the greatest orator whom I have ever heard.

He was generous—he was, in fact, Prince Bountiful. He wept always when the poor cried, and probably, at least, and it is no exaggeration to assert it, one-half of his immense professional income was given to others, for the fact remains that when he died he left, outside of his library, but a very small estate. I remember one night I had the pleasure of riding with him from the City of New York to Albany. He had an engagement before the Court of Appeals, and I was en route to attend to my duties in the Legislature. I shall never forget the talk of that winter's night; on his part so full of reminiscences; so full of love and charity for all mankind; simple and tender as a child.

In speaking of Mr. Brady's cases it is very difficult to cull those in which he shone with more lustre than in others, because, in his mental efforts either at the bar, before the Court, or upon the rostrum, he was what is termed a very equal and even

man. Probably the material was so exhaustless that he needed only to call upon his resources to have his mind respond.

One very important case in which he appeared was a patent cause which was argued at Trenton in the State of New Jersey, and he had for an associate Daniel Webster. These two giants were opposed by half a dozen of the ablest lawyers in America. Mr. Brady opened the argument for the bill and he was followed by the other side, at least three or four of the most eminent men in the country combating his views. When it came to Mr. Webster to reply he paid Mr. Brady the stupendous compliment that, in Mr. Brady's opening he had covered the entire ground; that his position had not been successfully or even seriously assailed, and therefore, there was nothing for him to add to the masterly effort of his brother Brady.

It is difficult for those who did not know Mr. Brady to credit such incidents as this, but I have it on the best authority that the statement I have now made is substantially true.

One of the most remarkable cases ever tried in this country was that of the criminal prosecution of General Daniel E. Sickles for the slaying of Philip Barton Key. This occurred prior to the Civil War. General Sickles at the time of the homicide was a representative of Congress from New York City. He had previously been attached as Secretary of Legation to Mr. Buchanan when the latter was Minister to England.

General Sickles was a lawyer of ability and conspicuous prominence and he was altogether regarded as one of the most promising men of his time. He had married a young Italian girl by the name of Theresa Bagioli, who at the time of the marriage resided with her parents in Lispenard street in the City of New York. When General Sickles assumed the discharge of his duties in Congress he took his bride with him to the City of Washington. She was a lady of the most remarkable personal beauty, of great fascination of manner and of more than ordinary intelligence, and she became at once a shining light in the social life of the national metropolis. She attracted the attention of Philip Barton Key, who was at once a fop, a voluptuary and a systematic seducer. After a long siege he triumphed over the honor of Mrs. Sickles and accomplished the domestic ruin of her husband.

Mrs. Sickles and Mr. Key were accustomed to meet in a house situated in the suburbs of Washington. Their intimacy was discovered and the fact communicated to Mr. Sickles. On the very day of the shooting, Key appeared before Mr. Sickles'

residence and waved a handkerchief, which salute was afterwards discovered to be the sign agreed on for a future assignation between him and his unhappy victim. Mr. Sickles was in the house at the time, and the presence of Key in the street before his house was notified to him. He immediately left his residence, pursued and overtook the adulterer, and slew him in his footsteps.

The occurrence created the greatest consternation and excitement throughout the country. General Sickles was put upon his trial and he selected as his counsel a trinity of marvelous ability. His advocates were Mr. Brady, John Graham and Edwin M. Stanton.

Mr. Brady was the leader for the defense. He argued the questions of law which arose at the trial, examined and cross-examined the witnesses and made the most remarkable opening for the defendant. Mr. Brady's great capacity on this occasion was stimulated by a warm love, affection and friendship which he entertained for Mr. Sickles.

The technical defense, of course, was that of insanity. The real reliance was on the unwritten law of all peoples—that the life of the adulterer is forfeit to the husband whom he had wronged. It is best typified by Mr. Brady himself in his opening when he said: "I shall, gentlemen prove to you, circumstances which for a hundred years past have been regarded as a justifiable retribution for domestic peace destroyed, for hopes blasted, home desecrated of all that the heart has garnered up as its last, its only, solace withered by some brilliant and insidious seducer whom the arm of the law cannot reach."

After a tremendous legal controversy which lasted for weeks, Mr. Sickles was acquitted and he paid his debt of gratitude to the nation by contributing in a very large degree to the preservation of his country upon the field of Gettysburg. Probably in no cause in which he ever appeared did the transcendent genius of Mr. Brady shine out more resplendent than on the occasion which secured the acquittal of Mr. Sickles.

Mr. Brady was also the counsel before the Court of Appeals for Edwin Forrest in his celebrated controversy with his wife. Charles O'Connor appeared for Mrs. Forrest. In the trial below John VanBuren represented the interest of Mr. Forrest and after a long legal struggle the jury found a verdict in favor of the wife of the great tragedian.

John VanBuren was a man of great natural powers, but he was not a close student and he failed somewhat in the proper



development of the details of his case. It seems to me that very few can read the testimony of the trial without coming to the conclusion that if Mr. Forrest was guilty his wife was not innocent, but the public excitement and clamor, the power of the press and sympathy for an unfortunate woman, carried the day for the wife.

Mr. Brady, as I have said, argued the appeal for Mr. Forrest in the Court of "Last Resort," and although his argument was one of great power, replete with logical force, legal learning and rhetorical finish, the court above after careful consideration, came to the conclusion that the cause below was decided upon a question of fact and could not be disturbed. What the fate of the verdict might have been had Mr. Brady appeared on the trial at *nisi prius*, must be left to conjecture. It is the opinion of many, however, that had he been originally entrusted with the defense of Mr. Forrest a different outcome might have resulted.

One of the last great criminal trials in which Mr. Brady appeared was that of the People *v.* General Cole for the murder of Speaker Hiscock. It appears that the deceased, in the absence of the accused, while acting as professional adviser for his wife, succeeded in debauching her. That the information which General Cole received was conveyed to him by his stricken wife through the instrumentality of a confession; and that in the frenzy of his passion and revenge he immolated Speaker Hiscock almost upon the very steps of the Capitol.

Mr. Brady's associate in this trial was William A. Beach, who was, as I have before said, one of the greatest advocates who ever lived in any country or in any age. General Cole was acquitted and this great trial may be said to be the last criminal cause in which the great powers of Mr. Brady were invoked.

At the time of the Civil War Mr. Brady took strong ground in favor of the Union and in favor of putting down the insurrection; refusing to listen to any compromise that did not involve the security of the Federal Union. Prior to the war he had been a strong Democrat. When the South resolved upon her suicidal conduct in seceding from the Union Mr. Brady used all his vast influence to recruit the armies of the nation and to hold up the hands of the general Government. The effect of his position, particularly in the State of New York, was marked and impressive. He lived to see the rebellion overpowered and the institutions of the country placed upon a more enduring basis. No Greek or Roman, lover of his country, ever displayed more

patriotism and zeal than Mr. Brady brought to the service of the United States in the hour of her supreme trouble. He was respected and beloved of all men, and when he died the heart of the nation stood still because, it was realized that a great patriot, lawyer and statesman had forever passed away.

His brethren of the bar covered his memory with the flowers of eulogy.

*Geo. M. Curtis.*

NEW YORK CITY.

*(To be continued.)*

## THE NATIONAL IDEA.

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In these times, matter departing somewhat from the ordinary range of legal thought will perhaps be pardoned, even in a strictly law journal. The intimate connection between politics and constitutional law may, perhaps, be an additional apology for such a departure.

At the bottom of the difference of opinion which has divided men in regard to the proper action of this country in reference to the controversy with Spain, will be found in many cases, a radical difference in conception as to the nature and proper functions of this nation.

On the one hand the view is taken that the nation, with its instrument, the government, is merely an organization for securing the advantage and profit of its constituent members, a sort of corporation limited; and that it cannot act as regards any outside matters from any consideration not connected with the direct interest or advantage of its own citizens. This view was expressed recently to the writer by a very intelligent advocate, somewhat as follows: "The country has no right to sacrifice a dollar or a man for any purpose except for the direct advantage of its own citizens or the protection of its own interests." It is perhaps well illustrated by a remark which its advocates are very fond of using, attributed to Count Bismarck: "That all the Bulgarians were not worth the sacrifice of the life of a single Pomeranian grenadier."

Such persons regard with impatience and disgust any suggestion that the country should act from disinterested motives. They hold that oppression and injustice outside of our own borders, not affecting our own citizens, no matter how atrocious, are no legitimate concern of ours. If it can be proved that the *Maine* was actually blown up by the Spanish government, they believe that is a matter which we may properly resent and which might be proper cause of war. Possibly, any interference with our trade or commerce, certainly any trespass on the property of a citizen, is legitimate cause of war. All other considerations are regarded with contempt and are stigmatized as cant.

On the other side, we have the directly opposite view: that

the nation is not a mere machine or business organization, that it is a personality; that in the main it should confine itself to its own internal affairs, protecting the interests of its own citizens; that the peace of the world and the progress of humanity are, on the whole, best subserved by such a course, but that that does not cover its whole duty; that in an extreme case it may have obligations of honor and morality resting upon it, in the same way that they rest upon the individual. This was finely expressed by Milton when he said that "a nation was nothing but one huge Christian personage, one mighty growth and stature of an honest man, as big and compact in virtue as in body."

Every nation has its character which results from its history, the traits of its people and the organization of its government. When we speak of England, Spain, France, Germany, the names connote certain characteristics which make up our conception.

National character must be taken into account, and you can no more convince the American people that the affairs of Cuba or of any other people on this continent, within close proximity to our borders, are no concern of ours, that their wrongs, no matter how great, are none of our business, than you could convince Bismarck that the German nation had any concern in the affairs of Armenia, unless Germany could make something out of it. Our nearest blood relation, Great Britain, partakes of the same disposition. The sneers of the Continental Powers at the pious pretenses, as they consider them, of England, spring out of their inability to conceive that national action can be actuated by anything but pure selfishness. It is to the credit of England that it is the only nation ever charged with hypocrisy because it shows that it at least pays some deference to morality in its external relations. The history of England, to an intelligent reader, shows convincingly that a zeal for righteousness has really governed its action in some cases, and it is absolutely certain that such a motive has sometimes controlled the action of this country. Where, for instance, was the excuse for the action of the United States and England, followed, it is true, in this case, to a certain extent, by the other nations, in reference to the foreign slave trade? Had a purely selfish conception prevailed there would have been no legal basis for such interference. The intervention of England in the case of Greece, was a clear case of action dictated by this motive.

Milton's conception, quoted above, was not a mere poetic flight of imagination. Cromwell acted, in many cases, in the

spirit so eloquently expressed by his private secretary. History relates that when the great protector heard of the sufferings of the Vaudois, he shed tears; and state papers written by the same great secretary show that he was prepared to put forth all the power of England on land and sea to stop these persecutions. This spirit, handed down as it is by the best traditions of the English race, survives in the American people, and you cannot eradicate from their minds the idea so often expressed, that it is their duty to sympathize with, and in extreme cases to aid, the struggles of a people resisting atrocious tyranny. The opinion that although the destruction of a mule belonging to an American would justify a demand for redress, the slaughter of a whole people with circumstances of unheard-of atrocity, within one hundred miles of our borders, is none of our business, is one which will never be tolerated by the people. It cannot obtain outside of the circle of those who have been educated and refined beyond sympathy with common instincts and those who have become so absorbed in money getting as to make credit a fetic, and to regard any injury to that as the one unpardonable crime. Beyond these circles there is a prevailing feeling that this country has a mission in the world, at least as far as this continent is concerned; that great national crimes outside its limits are not matters of indifference to us and may be so flagrant as to call for active interference.

Two successive administrations of opposite parties have irrevocably committed the country to the position that it has a certain measure of responsibility beyond its own borders. The Venezuela message of Cleveland and the Cuban messages of Cleveland and President McKinley have placed the matter beyond doubt. "The dream that by much tribulation ye shall make whole flawed hearts and bowed necks straight," is a reality. The national conscience is a force which must be reckoned with in any Anglo-Saxon country, and Milton and Cromwell are better exponents of that conscience than Bismarck.

It is not the first time in the history of the country that the colleges and the circles of trade have failed at first to appreciate this fact. The truth is not always first discovered by those who search for it "in the ashes of the burnt out mind." The fanatics on both sides were nearer the truth in '60 and '61 than those who called themselves wiser and hoped by compromise to defeat the laws of nature. The man who cultivates himself to such an extent that he is afraid to allow his sympathies to act fails often to appreciate the truth.

The present conflict with Spain is as inevitable a result of the close contact of opposite systems of government and opposite ideas of national morality as was the irresistible conflict of 1861. It must always be remembered, a fact which we are inclined now to lose sight of sometimes, that the *Maine* incident was not the real cause of the war. That incident brought matters to a head and resulted in the culmination of an inevitable conflict which had been approaching for a series of years. It no more caused the war than the invasion of John Brown caused the war of 1861. It was but a symptom and itself a result of the real cause.

Yellow journalism has sometimes been nearer the truth than the organs of an over-intense respectability, and the pictures of the starving reconcentrados, too shocking to be shown to respectability, irresistibly appealed to the national sympathies and aroused an indignation which in the end had to work itself out in national conflict. The sneering comment that the war is the result of mere political machinations or of the desire of contractors to make money, can only come from those whose minds, by some prejudice or narrowness, have been barred from true sympathy with the national feeling. On the contrary, it has been distinctly a national movement which has swept the politicians along with it, to some extent against their will. The politician may control offices but he never controls popular feeling or action. That is not his business. He makes his living by balancing himself on the top wave of popular feeling. The men who have real influence on public opinion, in this country, are few, and are statesmen or popular leaders, never in any sense mere politicians. They are men of whose wisdom and sincerity the people have become convinced. Such a man was Lincoln, and such, in a measure, was Cleveland.

The prevalence of a purely selfish conception of the nation's duties, is one which must be fatal in the end to the spirit of devotion to country which is the sole reliable basis for republican institutions. It is an old saying, that a man's character is inevitably molded by the object of his worship. If the national idea is a purely selfish one, the character of the individual citizen must inevitably become selfish in public matters. Once set before him as the only end of national action the purely practical one of profit or advantage to the country, and it is not long before his own individual actions will be governed by the same motive. He will say to himself, Why should I sacrifice my own interests and my own safety, for a nation which itself makes no

sacrifice and is actuated by no generous motives, whose flag is a symbol of nothing higher than enlightened selfishness? When this idea becomes fixed in the public mind, the fate of China is already in view. That we are in no danger of such a fate is due rather to the common people, who do not analyze and distrust their honest impulses, and who, at bottom, are animated by a passion for righteousness and an Anglo-Saxon hatred of injustice, rather than to the mere student theorist who sneers at the "aggressive patriotism" of common people.

The morbid distrust of popular impulses, although it may be a vice of New England culture, is not a necessary characteristic of the scholar. Lowell and, to come nearer home, the late President Woolsey, were examples to prove the contrary. Mr. Adams recently expressed the truth when he said it was decreed by Providence that bad government should, in the end, come to destruction, and drew an accurate parallel between the Turkish government in the East and Spanish control in the West. Both are doomed to perish in the near future. It is a true perception of the absolute impossibility of a system like the Turkish or the Spanish existing in their proximity to a free country, which lies at the base of the popular demand for the independence of Cuba.

It is strange that intelligent people should fail to see that President Cleveland's message sent to Congress three years ago, was in substance a declaration of war with Spain; that everything else has followed necessarily from the position then taken by this country. When he declared that if the conflict in Cuba was not brought to an end within a reasonable time the United States would interfere, he stepped outside of the ordinary lines of international law. To any careful observer, it was evident that the pacification of Cuba was beyond the power of Spain by any method short of complete separation of that colony from the mother country; that Spanish pride would never permit the relinquishment of its territory except under the compulsion of some outside power. The condition was practically known to be impossible and the threat of armed intervention was therefore positive. After the message of Cleveland, the abuse of Congress and of that convenient scapegoat, the politician, for causing the war, seems almost childish.

The outcries of some international lawyers remind one of the appeals to the constitution which emanated from certain quarters during the War of the Rebellion. It might as well be frankly conceded that we have passed beyond the domain of ordinary international law. The pretexts which have been invented for

harmonizing our action with the rules found in the books, are, some of them at least, very strange. Interference by one nation with trade to a portion of its own territory can never be legitimate cause of war; and as for the claim that injury was done to this country justifying interference because we are put to the expense of keeping filibusters out of Cuba, it is very much like bringing an action against your neighbor for having a melon patch because it puts you to expense and trouble to keep your boys out of it.

In our action concerning Cuba we have passed into the domain of the higher law, and our appeal must not be to text-books, but to natural justice and to the law of right. There is not the slightest doubt that the verdict of the civilized world will in the end sustain that appeal.

*Talcott H. Russell.*

NEW HAVEN, CONN., May 1.



## CONTRACTS EXEMPTING EMPLOYERS FROM LIABILITY FOR NEGLIGENCE.

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The negligence, real and imaginary, of employers of labor, gives rise to a large proportion of the lawsuits of every industrial community. Such actions are among the contingencies which are expected and in recent years commonly insured against. To avoid the expense of casualty insurance and the risks of not insuring, the wit of the employer has devised various schemes which have from time to time come before the courts. They are intended to furnish a sort of cheap insurance. It is the object of this article to bring in review some of the principal authorities and seek what answer the courts are giving to the question whether the insurance is as effective as it is economical.

The simplest way to attain the result desired by the employer is to adopt the scheme of a contract between employer and employee, under which the latter for a consideration, substantial or nominal, expressly waives all right to recover for personal injury.

Such contracts have occasionally come before the courts and have met with varying fortunes. On the one hand it has been said that freedom of contract should be respected and that the workingman being under no disability and dealing as he does at arm's length with his employer, should be held to his bargain. On the other, it has been contended that the freedom which the employee is presumed to enjoy of choosing employers and refusing to contract with those who exact terms unfavorable to him is more theoretical than real, that the workingman as a matter of fact gets little or nothing for the risk which he assumes and that public policy demands the avoidance of such contracts not only for the good of the employee but for the safety of society at large. It may be assumed at the start that a contract should stand unless there are strong reasons why it should not and that the courts should yield not too readily to the flexible and uncertain demands of public policy.

There is no reason why a contract changing the degree of care, which in the absence of agreement the law imposes, should be invalid by virtue of that fact alone, or why under ordinary

circumstances it should be unlawful for parties to contract that no care at all need be used; or in other words, that there shall be no liability for negligence. There seems, therefore, to be no general rule that contracts under which the contractor is not liable for negligence are illegal.<sup>1</sup>

It is undoubtedly true that contracts of this nature react upon society at large and render the world a little less safe to live in, but the effect is too remote and the public considerations not pressing enough to alter the general policy of the law, to leave contractors alone.

But to this principle of freedom of contract there are well-recognized exceptions. Many of the courts say that if the contractor is performing services of a quasi-public character, which all may demand, and of which quite likely he has a monopoly, his power to contract away his liability for negligence is much restricted, and hence the long lines of decisions defining the powers of common carriers, telegraph companies and the like in this regard. Is there to be added to this exception to the rule, a second, that one may not by contract exempt another who owes him certain care in matters affecting personal security by virtue of their relation from the consequence of his negligence? It is obvious that the question as it arises between employer and employee is but a phase of a much broader question, and here it may be said that the fact that the employer is discharging a quasi-public duty, as that of a common carrier must be immaterial. Whatever his relation to his customer that to his servant is purely private and contractual.

To recur for a moment to the broader aspect of the question, there can be no consideration of public policy which prohibits a party who is allowing another to enter into a relation with him for the sole benefit of that other to make a contract under which the one who is granted the favor shall assume the risk. Under those circumstances the contract is rather technical than real. Hence one who is riding on a free pass may assume all risks.<sup>2</sup>

As to contracts exempting employers from liability, the English law as interpreted by the courts, pronounces them valid, the leading case being *Griffiths v. Earl of Dudley*, L. R.,

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<sup>1</sup> As illustrating this, see *Hartford Fire Ins. Co. v. C. M. and St. P. R. R. Co.*, 70 Fed. Rep. 201; 30 L. R. A. 193. *Griswold v. Illinois Central Railroad Company*, 90 Iowa 265; 24 L. R. A. 647. *Stephens v. S. P. Ry. Co.*, 109 Cal. 86; 29 L. R. A. 751.

<sup>2</sup> *Griswold v. R. R. Co.*, 53 Conn. 371; *Quimby v. Boston and Maine R. R. Co.*, 150 Mass. 365; 5 L. R. A. 846.

9 Q. B. Div. 357. In this case an injury occurred through a defect in an apparatus existing through the negligence of the defendant's inspector, whose duty it was to see that the machinery and plant were in proper condition. There existed among the workmen a benefit association which paid an indemnity to persons injured, to which the employer contributed the same amount as the sum of the contributions of the workmen, the latter sums being deducted from their wages and paid into the fund.

While the plaintiff was in the defendant's employ the latter caused to be circulated through the collieries and posted in the houses of the employees, a printed document headed "Conditions of Employment," reciting that in consideration of the employer continuing to contribute to the benefit society, and of the continued employment of the several workmen and as a part of the terms of their employment, it was agreed that every employee undertook in behalf of himself and his representatives to look to the benefit fund alone in case of injury, and that the master should not be liable even in case of negligence. The injury came squarely within the terms of the Employers' Liability Act and the trial court held the claimed agreement void for want of mutuality and consideration, and as against public policy. The Queen's Bench reversed this decision, Field, J., saying: "There is no suggestion that the contract was induced by fraud or by force, or made under duress, and it was not a naked bargain made without consideration, for the defendant contributed an amount to the club equal to the whole amount of the contributions from workmen. I am unable to concur in the view taken by the learned county court judge of these facts and of the statute. He held that the contract was against public policy. It is at least doubtful whether, where a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intent of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this one are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy."

Were the opposite view based upon the theory that it is the policy of the law to protect workmen as a class against imprudent bargains this reasoning might be conclusive. The case assumes, however, what is obviously not the fact, that the inter-

ests of the general public are not involved and does not consider the broader principle which must lie at the basis of decisions reaching an opposite conclusion, that public policy will not permit one to exempt another from liability for negligence resulting in injury to life or limb.

In this country the courts of Georgia have reached the same conclusion. In *Western and Atlantic Railroad Company v. Bishop*, 50 Ga. 465, an injury occurred likewise through a defect in apparatus. The written agreement of hiring provided that the plaintiff should take upon himself all risk of injury whether occurring through negligence or otherwise. The court held that this prevented a recovery for anything except injury through criminal negligence. Speaking through McCay, J., it said: "We know of no law which limits the right of employer and employee to contract for themselves as to the relative rights and duties of each to the other, provided the contract is not forbidden by positive law or be contrary to public policy. They are both free citizens. Labor is property and the laborer has, and ought to have, the same right to contract in reference to it as other freemen have in reference to their property. Generally, the duties cast by law upon employer and employee are only implications of law, in the absence of stipulations by the parties.

"\* \* \* For myself, I do not hesitate to say that I know of no right more precious, and one which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them wiser and better than their own. But they should remember that the same law-giver which claims to make a contract for them upon one point may claim to do so upon others, and thus step by step, they cease to be free men. We do not say that employer and employee may make *any* contract: we simply insist that they stand on the same footing as other people.

"No man may contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers, and doctors—of buyers and sellers, and bailors and bailees, as of employers and employees."

This reasoning must be sound as far as it goes, but it does not cover one other step involved in the decision which the opinion is written to support; namely, are not contracts generally to exempt from liability for serious personal injury occurring

through negligence opposed to public policy? This decision, made in 1873, has been at various times affirmed. The courts of that State have been, however, much stricter than the English tribunals in requiring clear evidence of the contract of exemption.

The case of *Georgia Pacific Railroad Co. v. Dooley*, 86 Ga. 294; 12 L. R. A. 342, took a view directly contrary to that of *Griffith v. Earl of Dudley*, as to this, holding that a printed rule declaring an exemption from liability and stating that continuance in service would constitute assent to its terms, although put in the hands of the servant, did not constitute a contract. This latter view is that of the Alabama court in *Louisville and Nashville Railroad Co. v. Orr*, 91 Ala. 548. In *Darragan v. N. E. R. R. Co.*, 52 Conn. 285, 309, it appeared that a similar rule was placed in the hands of the plaintiff but the point was not pressed, and the court remarked that "when such a question is presented we may be called upon to consider whether public policy will permit a railway company to make such a contract with its employees." The Arkansas court in *Little Rock and Fort Smith Ry. Co. v. Eubanks*, 48 Ark. 460, took a middle ground, holding that an employer may contract against liability for the negligence of a fellow servant imposed by statute, but could not against liability for negligence in duties which he personally owed as employer. This distinction is more apparent than real and fades away entirely in the case of a corporation employer. What real difference is there in this regard between the failure of a servant of a corporation to furnish proper machinery and that of a fellow servant to exercise care? They are both servants, both beyond the immediate control of the persons who constitute the corporation and out of whose pockets a judgment for damages would be paid. The validity of the exemption would have the same effect on the care which would be exercised in the one case as in the other.

The other American courts in jurisdictions where the question has arisen have generally taken ground diametrically opposed to that of the English and Georgia cases.

In 1881 Judge Gresham, holding the Federal Circuit Court, in *Roesner v. Hermann*, 8 Fed. Rep. 782; 10 Biss. 486, decided that a contract of this nature was void on grounds of public policy. In *Johnson's Administratrix v. Richmond and Danville Railroad Company*, 86 Va. 975, the Supreme Court of Virginia in 1890 said of such a bargain: "It would be strange, indeed, if such a doctrine could be maintained. To uphold the stipula-

tion in question would be to hold that it was competent for one party to put the other party to the contract at the mercy of his own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly in this court, than that a common carrier cannot by contract exempt himself from liability for responsibility for his own or his servants' negligence in the carriage of goods or passengers for hire. This is so, independently of Section 1296 of the Code; and the principle which vitiates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers, as such: it operates universally." While this does not seek to make a special rule for the relation of master and servant, does it not go too far in the other direction? What considerations of public policy can come in to avoid a contract of exemption from negligence in ordinary relations, affecting mere property interests? The case was not thoroughly argued, the point under consideration being conceded by counsel.

In *Hissong v. Richmond and Danville Railroad Company*, 91 Ala. 514, decided in the same year, the Supreme Court of Alabama passed upon the effect of a contract of hiring which provided "that the regular compensation paid for the services of employes shall cover all risks incurred and liability to accident from any cause whatever. If an employe is disabled by a accident, or other cause, the right to claim compensation for injuries will not be recognized." The injury happened through the neglect of a railway engineer and the statute provided that in an injury of that nature the master should be liable. The court held the contract of exemption void.

A Kansas statute made the master liable for the negligence of fellow servants. A contract signed by both parties provided that in consideration of the employment of the servant and the compensation paid him for his services and for the risks which he assumed, he agreed to exempt the master from liability for all injuries. The matter coming before the court, it was held in 1883 in *Kansas Pacific Railway Co. v. Peavey*, 29 Kan. 169; 11 Am. & Eng. R. R. Cases 260, that the contract was void, Chief-Justice Horton saying: "The State has such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith."

In *Railroad v. Spangle*, 44 Ohio State 471; 58 Am. Rep. 833; 28

Am. & Eng. R. R. Cases 319, decided in 1886, the court considered a signed contract by which the laborer agreed in consideration of his employment to release the master's liability for the negligence of a superior fellow-servant (recognized in that State), and held it void, saying: "Such liability is not created for the protection of the employed simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interest, and agreements." The same principle was extended to the hiring of slaves in *Memphis and Charleston R. R. Co. v. Jones*, 2 Head. (Tenn.) 517.<sup>3</sup>

The question, What will be a sufficient consideration to support the release, has given rise to some discussion.

Without deciding the principal question the New York Court of Appeals, in *Purdy v. R., W. & O. R. R. Co.*, 125 N. Y. 209, held that where one already an employee signed a contract purporting to release the liability in consideration of his continued employment and the compensation agreed to be paid him for his services and the risk assumed, the consideration was colorable only and did not support a contract. It is suggested that this is a question of fact, that the mere existence of previous employment is not conclusive, that the question in each case is, is there a new contract of service of which the exemption agreement forms a part? In *Griffiths v. Earl of Dudley* there was simply a continuance of employment, and the contract was upheld.

It may be said, then, that the current of American authority is strongly against contracts of this nature and with good reason. They do not present questions of assumed risk. No definite course of conduct, no known condition exists in which the employee acquiesces and with a knowledge of which pursues his work. He simply waives in advance a right which may arise in the future from an act which he cannot anticipate. Such an agreement in its effect goes beyond the immediate parties, it encourages negligence and affects society at large. There are certain rights also which are inalienable. The law as generally interpreted does not recognize a consent given by one to another to inflict a personal injury intentionally.<sup>4</sup> Is it consistent with the interests of society that it should give effect to a contract abridging his right of personal security just as truly in another way. The State has an interest in the lives and limbs

<sup>3</sup> See, also, *Otis v. Penn. Co.*, 71 Fed. Rep. 136.

<sup>4</sup> *Shay v. Thompson*, 59 Wis. 540; 48 Am. Rep. 538, and cases cited; Bull. N. P. 16; *Cooley on Torts*, p. 187.

of its citizens on the one hand and on the other there are rights too sacred to be the subject of barter.

Taught by experience, many corporations have organized benefit associations, sometimes as branches of themselves, sometimes as separate corporation controlled by them. Membership in them is voluntary, the employees paying their dues by voluntarily allowing a deduction from their wages. The corporations generally pay part of the cost of running them, in many cases assuming the expenses of administration and making up any deficiency in the amounts required for benefits. In return they reap their reward in the insertion of clauses in the contract between the association and the member providing that the receipt of benefits shall bar an action for recovery in damages on the one hand, and on the other that the bringing of suit for the injury shall bar the right to recover benefits. While such contracts have every appearance of attempts to evade the law, while the motives of their promoters are seldom disinterested, and while the schemes may be so worked that the employers contribute little or perhaps nothing and get their protection often practically free, they have been almost universally upheld.

The question may arise in two forms. First, there may be a suit to recover benefits. In such an action, it must be beyond question that if the contract provides that a previous suit for damages shall be a bar, it must be so treated. So far as the matter of benefits is concerned it is simply a contract of insurance. One class of liabilities is excepted, namely injuries for which compensation from the company has been sought. The rate of contribution to the fund may have been fixed with this exception in view. There is nothing contrary to public policy any more than there is in a contract of insurance where the liability is restricted to death or injury by accident and deaths from natural causes are excepted. This proposition is supported, for example, by *Donald v. C. B. & Q. R. R. Co.*, 93 Ia. 284; 33 L. R. A. 492.

The converse of the proposition is also upheld by the overwhelming right of authority, and it has been decided in a long line of cases that the receipt of benefits bars a suit for damages, the contract so providing.<sup>5</sup>

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<sup>5</sup> *Pittsburgh C. C. & St. L. R. R. Co. v. Cox*, 55 Ohio St. 497; 7 Am. & Eng. R. R. Cases (N. S.) 152; 35 L. R. A. 507. *C. B. & Q. R. R. Co. v. Miller*, 76 Fed. Rep. 439; 22 C. C. A. 264; 40 U. S. App. 448. *Martin v. B. & O. R. R. Co.*, 41 Fed. Rep. 125. *Eckman v. C. B. & Q. R. R. Co.*, 64 Ill. App. 444. *Otis v. Penn. R. R. Co.* 71 Fed. Rep. 136. *Vickers v. C. B. & Q. R. R. Co.*, 71 Fed.



One Federal Court, in *Miller v. C. B. & Q. R. R. Co.*, 65 Fed. Rep. 305, has refused to sanction the contract and held that there may be a recovery for damages notwithstanding.

In States where the statute allowing a recovery for injuries resulting in death is construed as creating a new right, it is logically held that if the benefit is not paid to the person entitled to sue he is not barred from recovering damages.<sup>6</sup>

And yet can the main proposition so ably sustained be really supported save upon the principle that a bald contract of exemption from liability is to be upheld? Some of the cases put the validity of the contract upon the ground that the employee does not give up his right to sue at the making of the contract, but only at the time he receives the benefits, which is of course after the injury. It is then that he elects, and his receipt of benefits constitutes an accord and satisfaction. If the benefits proceed from the corporation itself the consideration, it is said, passes directly from the negligent party; if from a subsidiary association, it is treated as a payment made for its benefit and the accord is supported by its contributions to the association as a consideration.

The result is that if the corporation pays its thousand men ten dollars apiece to release absolutely any future rights of action for negligence it is said to be contrary to public policy, while if it contributes ten thousand dollars to a relief association and the thousand men agree either to release any future rights of action, or to give up a benefit for which they have paid a consideration, it is said to be valid. And yet is not the second scheme a mere indirect form of the first? It is sought to be upheld upon the ground of accord and satisfaction; but it is admitted that in order to make it consistent with the demands of public policy the essential acts must be done after the injury. Here they precede it. The consideration passes from the company prior to it; the agreement is prior to it. When the employer is sued he says in effect: "You agreed before the accident that on the happening of a contingency—the collection of the benefit—you would not

Rep. 139. *Graft v. B. & O. R. R. Co.* (Pa.), 8 Atl. Rep. 206. *Johnson v. Phila. & R. R. Co.*, 163 Pa. St. 127. *Ringle v. Penn. R. R. Co.*, 164 Pa. St. 529. *Fuller v. B. & O. Employees' Relief Ass'n*, 67 Md. 433. *Lease v. Penn. R. R. Co.*, 10 Ind. App. 47. *C. B. & Q. Railway Co. v. Bell*, 44 Neb. 44. *Owens v. B. & O. R. R. Co.*, 35 Fed. Rep. 715; 1 L. R. A. 75. *Shaver v. Penn. Co.*, 71 Fed. Rep. 931. *B. & O. Ry. Co. v. Bryant*, 9 Ohio C. C. 332. *Spitze v. B. & O. R. R. Co.*, 75 Md. 162. *C. B. & Q. R. R. v. Curtis*, 51 Neb. 442, 71 N. W. 42. *State v. B. & O. R. R. Co.*, 36 Fed. Rep. 655.

<sup>6</sup> *Maney v. C. B. & Q. R. R. Co.*, 49 Ill. App. 105.

sue me; the contingency has happened." How does this differ from an absolute agreement not to sue? If the by-laws provide that a release to the employer be executed as a condition to the payment of benefits, and it is executed, the case is the same. The only consideration supporting the release was a payment prior to the injury, a mere past consideration. The release is simply to carry out the terms of the prior contract, and is subject to all its infirmities.

Such a scheme as thus described may spring from pure motives, may be just and fair, may have the elements of a noble charity, may be a movement in the direction of the brotherhood of man. But in its nature it is a subterfuge and in unprincipled hands becomes simply a clever device by which the workingman pays for his insurance and is rewarded for his forethought by being deprived of a possible righteous cause of action in the future, to his loss, to the injury of his class and to the harm of society at large.

*George E. Beers.*

NEW HAVEN, May 10, 1898.

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THE evidence is unmistakable that public opinion throughout the country looks upon the infliction of the death penalty with growing disfavor. This may be seen from legislation both federal and state. Early in 1897 an act of Congress was passed to reduce the number of cases in the Federal courts in which the death penalty may be inflicted. It provides that in all cases where the accused is found guilty of murder under the Revised Statutes of the United States the jury so finding may qualify their verdict by incorporating in it the words, "without capital punishment." The effect of these words is to reduce the sentence from death to imprisonment at hard labor for life. By virtue of the above act Thomas Bram, who has been again convicted of the murder of the captain of the barkentine *Herbert Fuller*, and his wife, will escape with his life.

A striking example of the tendency above noted is found in the action of the Ohio legislature, recently, in the passage of an act which provides that in capital cases the jury may recommend mercy in their verdict, whereupon the judge shall sentence the prisoner to imprisonment for life.

It will be seen that the effect of the above statutes and others of similar tenor is to leave the question of life or death wholly to the jury. That body not only finds the facts but virtually passes sentence in accordance therewith. The matter is removed entirely from the discretion of the court. It cannot be said that the discretion of the court is lessened—judges never have had any in this matter—but certainly the discretion of the jury is vastly increased.

Such legislation is fairly indicative of the growing prejudice in all sections to the infliction of the extreme penalty. The feeling that the state has no right to take a human life as a forfeit for crime seems to be gaining ground. At least the popular impression is that, granted so great a right to the state, it should be most sparingly exercised. Recent legislation has reflected this sentiment and the tendency seems to be to confine the right within narrow limits, making death the penalty only under circumstances which justify so harsh and rigorous a punishment.

The wisdom of the policy is an open question for the future to decide. It is midway between the extremes of the total abolition of the death penalty and its unrestricted infliction in capital cases, and may therefore appeal to advocates of both. It seems to combine many of their advantages.

\* \* \*

A RECENT decision of the highest court in the land is important in that it will do much toward settling a mooted question. The Supreme Court of the United States has declared the Illinois Inheritance Tax Act, constitutional and valid, thus placing itself in line with what appears to be the current of modern adjudication. The court finds the Illinois act not peculiar to itself, and determines its validity upon the general principles applicable to such statutes.

The court holds that an inheritance tax is not one on property, but on the succession to property, that the right to inherit property is a creature of law, not a natural right, and therefore that the state, the authority granting the right, may limit it with conditions, as it sees fit.

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#### BEQUESTS FOR THE SAYING OF MASSES.

THE courts of some of our States have been slow to get away from the rule of the English cases in which, under the amalgamated condition of church and state, bequests and devises for the saying of masses have been held void, as superstitious uses or creating perpetuities. But of four recent cases three decisions sustain, and only one denies, the validity of bequests for masses. The affirmative cases are *Moran v. Moran*, 73 N. W. 617; *Hoeffer v. Clogon*, 49 N. E. 527, and *Harrison v. Brophy*, 51 Pac. 883. These decisions are directly opposed to the English cases, although they are in harmony with the majority of the American decisions. In *Festoraggi v. St. Joseph's Catholic Church*, 25 L. R. A. 360, it is said: "Under

our political institutions, which maintained and enforced absolute separation of church and state, and the utmost freedom of religious thought and action there is no place for the English doctrine of superstitious uses." And the note to that case makes it very plain that no such rule or principle now obtains here. But opposed to the above decisions are those of the courts of New York, Alabama and Wisconsin. The grounds of these decisions vary. In New York charitable uses were abolished by legislation and in all valid trusts there must be a definite and certain beneficiary to take the equitable title. The Alabama court held that a bequest to be used in solemn mass for the repose of the testator's soul could not be supported as a charitable bequest. And the recent decision in *McHugh v. McCole*, 72 N. W. 631, was upon the ground that a trust to be sustained must be of a clear and definite nature and the beneficiary interest to every person therein must be fully expressed and clearly defined upon the face of the instrument.

So the decisions on this subject are not yet in accord. But the tendency of the American courts is all in the direction of sustaining the validity of these bequests. In the Wisconsin case the judge expressed regret that the intention of the testator could not be given effect because he had put it in the form of a trust provision. And in the Iowa case the court said: "It is not wise in such cases for courts to quibble about the technical trusts or beneficiaries. Results are of greater importance than technical names, and a bequest for a known lawful purpose, where the power of execution is prescribed and available, should never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law."

## COMMENT.

The promoters of the gigantic monopolies and trusts which are daily becoming more numerous, in their zeal to stifle all competition sometimes overreach themselves and exact from the concerns which they absorb covenants which the courts refuse to enforce as being in unreasonable restraint of trade. An interesting illustration of this is seen in a recent case in New Jersey, *Trenton Potteries Co. v. Oliphant*, 39 Atl. Rep. 923. Five of the seven potteries in Trenton engaged in the production of sanitary ware, and making about seventy-five per cent of the entire output of the country, were bought up and united into the Trenton Potteries Co. From Oliphant & Co., one of the vendors, an agreement was taken by which they jointly and severally agreed not to engage, directly or indirectly for fifty years, in manufacturing pottery, except as agents or employees of the Trenton Potteries Co., anywhere within the United States, except Nevada and Arizona. A couple of years later the Bellmark Pottery Co., was incorporated by other parties, and four of the members of Oliphant & Co. took four-fifths of the stock and actively participated in its management—*i. e.*, were much more than mere stockholders. The Trenton Co. then sought to enforce the covenant, but the court in a learned opinion by Vice-Chancellor Grey refused to enjoin them.

The broad statement of the rule that contracts in general restraint of trade are void, and that contracts in partial restraint are valid, can no longer be maintained. The authority of *Mitchell v. Reynolds*, 1 P. Wms. 181—the leading case on this subject, decided in 1711—has never been questioned, although there has been some modification of its principles and variation in their application. Several cases in England have upheld covenants restraining the covenantor throughout the whole Kingdom and even in foreign parts, where the business extended over such an area, because under these circumstances the restraint was reasonably necessary for the protection of the covenantee: *Jones v. Lees*, 1 H. and N. 189; *Cloth Co. v. Lorson*, L. R. 9 Eq. 645; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Maxim-Nordenfelt Case* [1893], 1 Ch. Div. 630; Lord Justice Fry, in *Rousillon v. Rousillon*, saying that the protection of the covenantee, and not the interests of the public which was the original basic principle of the rule, is the only test of the reasonableness of the contract. And in these days of enlarged business relations and connections often reaching out over almost the whole world, there seems no good reason why, when the restraint is co-extensive only with the interest to be protected and with the benefit meant to be conferred, the covenant should not be upheld. And with regard to partial restraints, the rule is, not that they are good, but that they may be good, and that they will be good

provided the restraint be reasonable. And to be reasonable it must be no greater than is reasonably necessary—*i. e.*, the excepted area must not have been chosen merely to avoid the disfavor of the law and to force the covenantors as far away as possible, in the attempt to actually prohibit competition, which appears to have been done in this case, as pottery cannot be manufactured in Nevada and Arizona, and the business when sold did not extend beyond the Mississippi. And its reasonableness must be tested by the extent of the business at the time of making the sale, and the covenant, and not by its future growth, when it may have extended over the whole country.

It may seem that this case goes against the leading American case of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, where the covenant was not to engage in the same business for ninety-nine years anywhere in the United States except Nevada and Montana, but in reality it does not hold *contra*, for in that case the court expressly refers to the fact that the business extended over the whole United States and follows the English cases in upholding the covenant. In *Lufkin Rule Co. v. Fringeli*, 49 N. E. Rep. 1030, a recent case in Ohio, the agreement was not to engage in the same business in the State of Ohio or the United States, the business being limited to certain sections of the country, and the court refused to enforce the covenant. It questions the soundness of the rule that the question of reasonableness is one wholly between the parties, and, following the economical school which opposes all monopolies and combinations restricting free competition as against public policy, declares that the interest of the public must now be considered more than ever before. But contracts in general restraint of trade, when the trade is general, no more tend to create monopolies, than contracts in partial restraint, where the trade is only local. In either case the community where the business extends, and there only, are deprived of the services of the covenantor, and that, for the reasonable protection of the covenantee, whose motive, unless malicious, in exacting the agreement cannot legally be inquired into, though he have the very purpose of preventing competition and controlling all the output.

There has been recently rendered in the Supreme Court of the United States, in *United States v. Wong Kim Ark*, 18 Sup. Ct., 457, a decision upon the old question of the citizenship of persons born within the limits of the United States of alien parents. It appears to be the first time that this question has been directly decided in this Court, although it has frequently been incidentally involved in previous cases; and the rule here laid down is apparently a ratification of the decisions heretofore reached in the various state and circuit courts. The individual whose citizenship was under discussion was of Chinese extraction, and claimed the rights of a citizen by reason of birth here. The Court deals with the question very exhaustively, and laying its foundation upon the assumption that the

common-law rule of England that "every child born in England of alien parents is a natural born subject, unless the child of a public minister of a foreign state, or an alien enemy," was in force in the colonies at the time of the Declaration of Independence, and prevailed in the United States thereafter, holds that this rule is but reenacted in the Civil Rights Act of 1866, and in the Fourteenth Amendment.

Although hopelessly in the minority, Chief-Justice Fuller, with whom Mr. Justice Harlan agrees, dissents from this opinion, and, upon what appears to be the better view, holds that the common law of England does not control the question under discussion. He very aptly shows that if the English rule governs, then all children born abroad of American citizens, since the enactment of the Fourteenth Amendment, become by such birth subjects of the country wherein they are born, and in order to become American citizens must be naturalized as any other alien. But the English rule emphatically denies the right to change one's allegiance; while the United States has always upheld the right of expatriation. Moreover, in this country, the alien must be permanently domiciled, while in Great Britain birth during mere temporary sojourn is sufficient to render the child a British subject.

But both by our treaty with China and by statute, the right of citizenship is forbidden to this applicant. To put upon the Fourteenth Amendment the construction urged by the majority of the Court is to "override both treaty and statute." The exercise of the right of deportation which we also have would under this construction cause the permanent separation of many families.

The Fourteenth Amendment was founded on the act of 1866, which contained the words, "and not subject to any foreign power." But these words were not necessary to shut out the children of public ministers of foreign states nor alien enemies, since by their birth they were not "subject to the jurisdiction thereof;" hence they must have been inserted to exclude the children born here of resident aliens.

Although it is but recently that electricity was first employed commercially, there have been numerous decisions firmly establishing the principle that telegraph and telephone companies can be compelled to furnish service, not only at a reasonable price, but also to all persons, without discrimination, who may make application for such service. This principle has not until recently however, been applied to companies furnishing electricity for lighting purposes, although there does not appear to be any good reason why they should stand in any different position from that occupied by the telegraph and telephone companies.

In the recently determined case of *Cincinnati, H. & D. R. Co., v. Village of Bowling Green*, 49 N. E. Rep. 121, an attempt was made by an incorporated village to compel, under a State statute, a railroad to



illuminate with certain electric lights its tracks lying within the limits of said village; and upon a contention by the railroad that they were, by being obliged to use a certain system of lamps and attachments, the exclusive right to maintain which had been granted to the electric lighting company there situated, thereby placed at the mercy of that company the court laid down the following rule. "An electric light company, owning an electric plant, and engaged in furnishing light to the inhabitants of a city or village, and in lighting the streets thereof, has so far devoted its property to a public use that it is bound to furnish light within such city or village impartially to all applicants, at a reasonable price." This conclusion seems eminently just, since gas companies, although furnishing light by another method, have repeatedly been held under obligations to furnish indiscriminately to all, and there certainly can be nothing in the medium itself upon which any freedom from such a duty could be based.

Revised Statutes §§5197, 5198, provide that national banks may take interest at the rate allowed by the laws of the State where the bank is located and no more, that knowingly taking a greater rate shall be deemed a forfeiture of the entire interest, which the note "carries with it, or which has been agreed to be paid thereon," and that in case the greater rate has been "paid," the payor may recover back in an action of debt commenced within two years, twice the amount so paid. In the case of *Brown v. Marion National Bank*, the Supreme Court construed these sections with reference to renewal notes, which included usurious interest. The Supreme Court of Kentucky held that interest included in a renewal note was "paid" and had thereby become new interest-bearing principal. But interest included in a renewal note or evidenced by a separate note is not paid within the meaning of the Act, says Justice Harlan, nor is the forfeiture thus waived, for a clear distinction is made between interest which a note "carries with it" and interest "paid," and if interest included in a renewal note were "paid," then the borrower could immediately sue the lender and recover back twice the amount of interest thus paid, when in fact he had not paid the debt nor any part of the interest, as such. The sum included in the renewal note, in excess of the sum originally loaned, is interest which that note "carries with it or which has been agreed to be paid," and not, as to any part of it, interest paid. "No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid." But where the interest has actually been paid, then it can not be set up by way of counter claim or set-off in an action on the note, but the remedy given by the statute—a separate suit—is the only remedy available. *Barnet v. National Bank*, 98 U. S. 555.

## RECENT CASES.

## CRIMINAL LAW.

*Indeterminate Punishment—Constitutional Law.—Miller v. State*, 49 N. E. (Ind.) 894. An Indiana act provides that in cases of felony, where the defendant is between certain years, the jury shall merely find his age and the crime of which he is guilty, and that the power of fixing the amount of punishment shall be in the hands of managers of the reformatory to which the criminal is sentenced. *Held*, that this does not deprive the accused of a trial by jury. *Held*, further, that the act is not unconstitutional as allowing persons charged with executive duties to exercise judicial functions, since the power conferred on the managers is purely administrative.

*Second Offense—Evidence.—People v. Sickles*, 50 N. Y. Supp. 377. A New York law provides that conviction for a second offense shall be punishable more heavily than for the first. *Held*, that if a person is indicted under this law the first offense must be proved at the trial, although it is admitted before the impanelling of the jury since its proof is a material part of the allegation. The introduction of evidence of the first offense by the state is not contrary to the rule preventing evidence of character to be introduced except by accused.

*Compounding a Misdemeanor.—State v. Carver*, 39 Atl. (N. H.) 973. Defendant, for thirty dollars, agreed in writing "to withdraw all further action against F. for illegal sale of liquor," in contravention of New Hampshire statutes and destroyed the evidence he had thereof. *Held*, that compounding a misdemeanor is an offense at common law and that a person may be convicted thereof, "though no offense liable to a penalty has been committed by the party from whom the reward is taken."

## COPYRIGHT AND TRADE-MARKS.

*Copyright—Publication—Depositing Copy in Library.—Jewelers' Mercantile Agency v. Jewelers Weekly Pub. Co.*, 49 N. E. (N. Y.) 872. Plaintiff furnished book relating to his trade to all who cared to subscribe under the contract that the books were only loaned, the title remaining in the plaintiff, and were to be returned at a fixed time. Plaintiff also deposited two copies of the book with the Librarian of Congress. Defendant used part of the material in the book. Plaintiff sued to enjoin on the ground that the book had never been published under the common law meaning of the term. *Held*, that in issuing the books to the subscribers the plaintiff had lost his exclusive property in it and that this constituted a publication. The deposit of two copies with the Librarian was also held to be a publication, although no copyright was secured.

*Trade-mark—"Royal" may show Origin and Proprietorship—Abandonment.—Raymond v. Royal Baking Powder Co.*, 85 Fed. Rep. 231, affirming *Powder Co. v. Raymond*, 70 Fed. Rep. 376. A label or trade-mark which, though distinctive, contains false statements calculated to mislead cannot be the subject of property. While the word "royal" may be descriptive of quality, yet

when applied to the whole output of a concern it may show origin and proprietorship. The contention that it does not will not be favored when maintained by one manifestly seeking to impose his wares on the public as the manufacture of another. After abandoning for twenty-five years the use of a fraudulent label, one cannot resume it to impose his wares on the public as the manufacture of one who has established a legitimate business under a similar label.

*Basis of Right of Trade-mark—Priority—Use—Invention.—Tellow v. Tappan*, 85 Fed. Rep. 774. *Held*, that the right to the exclusive use of a trade-mark or device does not rest on absolute priority of use or invention, but on such continued use as to make it point out the origin or source of the particular goods.

#### INSURANCE.

*Fire Insurance—Iron Safe Clauses—Books of Account—Substantial Compliance.—McNutt v. Virginia Fire and Marine Insurance Co.*, 45 S. W. Rep. (Tenn.) 61. Complainant held a fire insurance policy under which he was required to take an inventory at least once a year, and to keep a complete set of books, and to keep such books and inventory in an iron safe except during business hours; and which provided that failure to produce such books and inventory in case of a loss should constitute a bar to any recovery thereon. On the day before the fire complainant in taking a new inventory, in the same book with other inventories, inadvertently left the book out of the safe, and it, with current invoices, was destroyed. *Held*, in an action to recover on the policy, that when complainant produced duplicate invoices and showed beyond question the true status of his accounts and of his stock destroyed, he was entitled to recover, on the ground that he had shown a substantial compliance with every reasonable requirement of such policy. This case is at variance with *Laudman v. Insurance Co.*, 19 Ins. Law J., 572, where it is held, that this clause should be enforced, and that it was not a sufficient defense to show the custom of the insured to keep the books of his business in an iron safe as stipulated, but by accident or oversight on the particular occasion the precaution was omitted.

*Insurance—Increase of Hazard—Waiver of Forfeiture.—Alston v. Greenwich*, 29 S. E. (Ga.) 266.—An insurance policy contained the condition that policy would be void if the hazard should be increased by any means within the knowledge or control of the insured. A part of the insured store was rented to a tenant who largely increased the amount of hay stored therein. *Held*, Atchinson J. dissenting, that this constituted an increase of hazard, and that an inference to the contrary by the jury could not fairly be drawn. Also, the contract being valid, the policy could not be retained from the insured by the agent of the company. Therefore a delivery of the policy to the insured by the agent after loss was not a waiver of forfeiture for increase of hazard, though the agent had notice of the facts; neither was a partial appraisalment of the loss a waiver.

#### LIBEL AND SLANDER.

*Libel—Words Actionable per se.—American Book Co. v. Gates*, 85 Fed. Rep. 729. To publish of a corporation that the list of books in which it deals "contains some of the most disgraceful trash," that it puts out-of-date school

books in "frontier" or "backwoods" states, and that "books that are referred to nowadays as a laughing stock by intelligent teachers are foisted upon whole states for a series of years;" *held*, to constitute an actionable libel. Libelous matter regarding the method of transacting one's business is actionable without the allegation of special damage.

*Libel and Slander—Words Actionable per se.—Squires v. State*, 45 S. W. (Texas) 147. To send out a circular letter purported to be issued and signed by a nominee for office, and directed to the opposing party, wherein the nominee is represented as renouncing the principles of the party which he is openly espousing, and advocating those of the opposing party and requesting its support; *held*, to constitute libel, as calculated to bring such nominee into contempt of honorable persons, but not as representing him to be a person unworthy of holding public office.

#### MISCELLANEOUS.

*Game—Contract for Storage During "Closed Season"—Validity.—Haggerty et al. v. St. Louis Ice Manufacturing and Storage Co.* 44 S. W. (Mo.) 1114. Where a statute prohibits the killing of certain game a certain times of the year, and further makes it a misdemeanor for any person to have in his possession during the "closed season" any of the specified game; *held*, that a contract to store such game during the "closed season" and to re-deliver it at the beginning of the "open season," was void and could not be enforced. *Sprague v. Rooney*, 104 Mo. 360, 16 S. W. Rep. 505.

*Agency—Contract of Agent with Third Party.—Culver v. Nester*, 74 N. W. (Mich.) 532. An attorney with the knowledge and assent of his client made a contract with a third party by the terms of which he was to receive a commission if he brought about an auction sale by order of court of certain property in litigation claimed by his client, and the third party succeeded in buying the property at or below a certain price. *Held*, not void as in restraint of free bidding, as the third party was not restricted to the price named. The assent of the client who apparently wished the attorney to get his pay from the commission rather than to pay him directly prevents the contract from being void as bringing the interests of principal and agent into conflict.

*Constitutional Law—Due Process of Law—Compensation for Corporate Franchises.—Newburyport Water Co. v. City of Newburyport*, 85 Fed. Rep. 723. A statute under which a water company is in effect compelled to convey its plant to a city under threat of municipal competition, and which provides that in case the parties could not agree as to the price to be paid, the Supreme Court might appoint a commission to determine the value of said property, but such value to be reckoned "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company;" *held*, to be void as providing for the taking of property without due compensation. The fact that the company elected to sell under this statute, and petitioned the court to appoint the appraisers, *held* not to preclude it from maintaining a bill in a Federal court to test the validity of the statute.

*Equity—Mistake of Law—Constructive Notice.—Kelly v. Ct. Mut. Life Ins. Co.*, 59 N. Y. Supp. 139. Testator had made a policy payable to his son and then changed it, making it payable to his legal representatives. The son, as executor, had distributed the proceeds of the policy to the estate's creditors,

with knowledge that the former policy had been issued to him personally. *Held*, that the son could not recover on the former policy, though he did not know that at the time it was in existence, since the mistake was one as to his legal rights. The thing to be known was whether the policy had been legally issued and not its continued physical existence. *Held*, further, that if company's agent had told the son that the former policy had never been issued, but gave him full access to the books, he was chargeable with notice of the issue of the former policy, since an ordinarily prudent man could have apprised himself of the fact.

*Interstate Commerce—Regulations.—People v. Warden of City Prison, 50 N. Y. Supp. 56.* The laws of New York prohibit the sale of tickets by persons not the authorized agents of the carriers, and empower the purchase by the agents of given lines of tickets over other lines for through transportation. *Held*, that these laws are valid and are not an attempted regulation of interstate commerce. They do not in any way affect the fact of transportation or interfere with a passenger seeking to make a contract of transportation, but are merely an exercise of the police power for the protection of travellers.

*Divorce.—Olson v. Olson, 74 N. W. (Wis.) 543.*—A judgment of divorce on the ground of desertion, which was for the interest of both parties, will not be disturbed where there is evidence to the effect that the defendant was compelled to leave the plaintiff by reason of his cruel and inhuman treatment, but the answer fails to allege such fact or any fact as counter-claim.

*Legal Tender—Mutilated Bank Note.—North Hudson County Ry. Co. v. Anderson, 39 Atl. Rep. (N. J.) 905.*—Plaintiff brought suit for damages for being ejected from defendant's car, claiming that he tendered the conductor a dollar bill, from which a piece one inch and a quarter by one inch and a half had been torn on the upper left-hand corner. *Held*, not a valid tender, as there was absent a part of the bill by which the conductor might be aided in determining its genuineness. The rules of the Treasury Department with regard to the redemption of mutilated notes relate simply to redemption, and do not make such notes legal tender. The case is distinguished from that of *R. R. Co. v. Morgan, 52 N. J. Law 60, 18 Atl. 904*, when a genuine silver coin, worn smooth by use, was held to be a legal tender.

*Wills—Construction—Lapse of Legacies—Religious Bequests—Validity.—Kerrigan v. Taft et al., 39 Atl. Rep. (N. J.) 701.* *Held*, that a legacy to a priest, to be expended for masses for the repose of testatrix's soul, is a charitable, and not a superstitious use, and valid under the Federal and State constitution relating to freedom of conscience and religious belief. Const. U. S. Amend. I.; Const. N. J., Art. I., §§ 3, 4. Such a legacy creates a trust, which does not lapse on the death of the trustee before the testatrix, but will be carried out by the appointment by the court of another trustee. Compare to the same effect, *Hoefler et al. v. Clogon et al. (Ill.)*, decided February 14, 1898; and *In re Zimmerman's Will, 50 N. Y. Supp. 395*. For a case upholding such a bequest on the ground that it was an absolute gift, and not a trust which was void for uncertainty of beneficiaries, see *Harrison v. Brophy et al. (Kan.)*, cited on p. 279, Vol. VII., YALE LAW JOURNAL.

*National Banks—Assessments—Enforcement.—Hulitt v. Bell, 85 Fed. Rep. 98.* An assessment on notice from the comptroller of the currency in accordance with Rev. St., § 5205, is optional with the corporation, and is for

its own benefit. Its object is to restore the capital stock after it has become impaired, so that the bank may lawfully continue its business. Being of such character it can be laid only by the shareholders, and a levy by the directors is invalid. A special remedy by sale of a holder's stock having been provided by statute as a means of enforcing this assessment, it cannot be enforced by an action at law or in equity.

*Carriage of Live Stock—Failure to Unload—Liability of Receiver.—United States v. Harris*, 85 Fed. Rep. 535.—Revised Statutes §§ 4386-4389 relating to the shipment of live stock impose a penalty upon "Any company, owner, or custodian of such animals" for keeping them in cars more than twenty-eight consecutive hours without unloading. *Held*, that a receiver of a railroad company, appointed by and acting under the order of a Federal court, is not liable under this provision.

## MAGAZINE NOTICES.

The following are some of the leading articles appearing in late legal publications:

### *Albany Law Journal:*

- April 9.* Martin Grover, . . . . . L. B. Procter.  
*16.* Liability of Eleemosynary Institutions for negligence, . . . . . Gilbert Ray Hawes.  
*23.* What Constitutes Baggage within the meaning of the Law, . . . . . Percy L. Phelps.  
*30.* The Right of the United States to Intervene in Cuba, . . . . . W. W. MacFarland.

### *Central Law Journal:*

- April 22.* Homicides by Peace Officers, . . . . . Lewis Hochheimer.  
*29.* Recent Phases of Contract Law: Performance to the Satisfaction of the Promisor, . . . . . John D. Lawson.  
*May 6.* The Joint and Several Liability of Tort-feasors, and their Release, . . . . . Jno. D. Shackelford.

### *The Green Bag—May:*

- Judges and Their Environment, . . . . . Henry C. Merwin.

### *The American Law Register—April:*

- When a Ship Sails, . . . . . E. H. Dickson.  
 Gift Enterprises, . . . . . T. J. Meagher.

### *Harvard Law Review—May:*

- Jurisdiction over Foreign Corporations, . . . . . E. Q. Keasbey.  
 The Element of Chance in Land Title, . . . . . H. W. Chaplin.  
 Contributory Infringement of Patent Rights, . . . . . O. B. Roberts.  
 Joinder of Claims under Alternate Ambiguities, . . . . . G. R. Alston.

## BOOK REVIEWS.

*Law of Negligence.* By Thomas G. Shearman and Amasa A. Redfield of the New York Bar. Two volumes. Sheep. pages clxxxiv, 1427. Baker, Voorhis & Company, New York. 1898.

This treatise, first published over thirty years ago, has now reached its fifth edition. During that time it has been constantly in use by lawyers and continually cited by judges. Much of its success is due to the independent manner in which its writers have treated decisions even of the most authoritative courts. This feature has been continued, perhaps emphasized, in the present edition. Although 16,000 cases have received 40,000 citations, the text is logically arranged and written, and the foot notes furnish illustrations rather than exhaustive collections of authorities. The new edition has been substantially rewritten.

The authors take strong grounds of opposition to the Fellow Servant doctrine, and advocate its abolition by the legislature. The English Employers' Liability Act, and analogous acts in the States, are given at the conclusion of that chapter.

*Law of Negotiable Instruments.* Edited by Ernest W. Huffcut, Professor of Law in Cornell University College of Law. Law canvas, pages xvi, 700. Baker, Voorhis & Company, New York. 1898.

The Negotiable Instrument Law is the most important statute passed in recent years. Embodying as it does with slight variations the common law on the subject, it is eagerly turned to by students and instructors as a concise statement of the law. By that very virtue, however, it loses somewhat. Bereft entirely of the facts to which it is to be applied, it is to the student unintelligible in great measure. Professor Huffcut has taken this law as the basis of a text-book for students, illustrating and expanding it by carefully-collected and well trimmed cases. While an argument from an illustration is a dangerous method of reasoning, yet a background of facts must be had in order to apply intelligently any principle to new facts. Also, its application can be best explained by a judge who has either created the rule or himself applied it. Working on this theory Professor Huffcut has produced a model text-book.

To the practicing lawyer the book must prove of service in aiding in the construction of the statute. One chapter is devoted to the History of the Law Merchant and of Negotiable Instruments.

*The Science of Law and Law Making.* By R. Floyd Clarke of the New York Bar. Cloth, pages xvi, 473. The MacMillan Company, New York. 1898.

Mr. Clarke has written this book with two objects in view: "To

write an introduction to law which shall enlighten the lay reader as to the beauty and interest of its problems," and to discuss the question of codification. The first is made subsidiary to the second, introducing the layman to a knowledge of the form of the law and the workings of the courts in its application. Mr. Clarke takes strong ground against codification. The arguments for and against are reviewed and the question made distinct and clear. This method of illustrating the working of the systems of Case and Code Law, by applying their methods to the solution of the question of a contract in restraint of trade, is ingenious and convincing.

*A Treatise on the Military Law of the United States.* By Lieutenant-Colonel George B. Davis, Deputy Judge-Advocate General, U. S. A. Cloth, pages xii, 716. John Wiley & Sons, New York, 1898.

This treatise of Judge-Advocate Davis on Military Law as it exists in this country, is timely in its information and rules of court martial and the general characteristics of military procedure. The law student will find much in the book which is only the statement of common law and will find some difficulty in finding just what are the differences between the military and the common law. It will be very valuable for laymen who have no knowledge of the law and wish to know military procedure.

*The Memoirs of Chancellor Kent.* By William Kent. Cloth, pages viii, 341. Little, Brown & Co., Boston, 1898.

This life of the illustrious Chancellor is valuable and entertaining without pretending to be a great biography. It lacks the essential quality of such a book—that of being stimulating. But the letters have been very carefully selected and arranged, so that we get not only a clear impression of the man, but the best understanding possible of the important events in which he was an actor or which presented themselves during his lifetime.

In that day when newspapers were young and mails slow, the letters of public men were both the means of information and the vehicle of discussion and criticism of public matters, so that from them we learn the history of their time in the best manner. It is not strange that letters of that day should have been admirable, with so much care put upon them, and by many men, who, if not very illustrious in anything else, certainly wrote excellent letters. Chancellor Kent's letters are models of terse and clear expression. In his young days he had that tendency to a florid style which caused Webster so much trouble, but which was overcome by maturity. A valuable portion of the book is the letter on Hamilton written by Kent to Mr. Hamilton.

*Introduction to the Study of Law.* By Edwin H. Woodruff of the Cornell University College of Law. Cloth, pages 89. Baker, Voorhis & Company, New York, 1898.



Mr. Woodruff writes for the student just entering upon the study of law who is beset with strange books, strange ideas, strange everything. No attempt is made to lay down any rules of law save by way of illustration. The chapter-heads sufficiently show the aim of the book. They are: "I. The Scope of Law;" "II. How and Where to Find the Law;" "III. The Operation of Law;" "IV. Courts and Procedure." The student will gain much help from this book at a confusing stage of his study.

*The General Digest.* Annotated. New Series. Vol. IV. Law sheep, pages x, 1706, xxxi. Lawyers' Co-operative Publishing Company, Rochester, N. Y., 1898.

"The General Digest" continues to furnish a summary of all recent law exceedingly well classified. The addition of notes on well-selected topics and references to magazine articles has made it of still greater service to the practitioner. The present volume sets in black-faced type the name of the State in which a decision was rendered, making a case in a given State more readily found.

*First Book of Practice.* By Lemuel H. Foster. Collector Publishing Co., 1897. Sheep, pages 448.

There are here set forth the answers to many of those perplexing questions which always confront the young lawyer in the application of rules that he has learned from the text-book. He often is at a loss to know how to use the weapons that may be in his possession, and the book of practice serves well as a connecting link between the instruction of the recitation-room and actual procedure in court. The work covers proceedings in both law and equity, is compact and terse and cannot fail to be of great practical value.

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## THE MOST ANCIENT LAW.

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Mr. Herbert Spencer, in his "Principles of Sociology," dissents sharply from many of the conclusions of Sir Henry Maine regarding the earliest social states and legal conditions. Mr. Spencer is not a jurist. He has no great reverence for a law as a system of practical justice, he has no faith in law as a moralizing and improving influence, and he has little respect for law as the output of courts and parliaments. He is never more complacent than when he exhibits to the scorn of his readers the imperfections of law and lawyers.

Mr. Spencer is right in much of this. Law is imperfect, necessarily imperfect, and permanently imperfect. And here we speak of law, not in any vague and general sense as a rule of action, or rule of right reason, or formula of physics expressing a constant relation, but as a definite system of human legislation announced by courts and enforced by public authority. An ideal and faultless code must proceed from an infallible legislator, like the fabled systems of Oriental sacerdotalists. The appearance of such a body of law in the midst of our modern societies would be nothing short of a public calamity. It could never be fully enforced. It would not accord with the sense of right prevalent among the people. It would be universally condemned as visionary and utopian. If applied it would be essentially unjust in its operation.

Mr. Spencer's first literary venture brought out his "Social Statics." He has lived to see the folly of many of the conclusions expressed in this work, and in his riper years has repudiated them without reserve. This book assumed to treat of the equilibrium of a perfect society and exhibits the author as contending for the right to ignore the state, attacking the law of private ownership in land, opposing sanitary regulations,

and advocating private coinage of money. The work has no place in the system of Synthetic Philosophy; it does not follow the scientific method but is full of metaphysical deduction. Now science knows nothing of so-called social statics and the equilibrium of a perfect society. All the world moves except what is dead. Perfection, when reached, cannot be preserved. Retrogression is as fully in accord with the philosophy of evolution as is progress towards better things. What is fittest to survive is ever tested by environment and not by an ideal and unyielding standard of excellence.

It is obvious that Spencer might have profited by an earnest study of philosophic jurisprudence. Lawyers, who have been fascinated by the Spencerian method of inquiry, are quick to recognize that legal institutions have had their genesis and development, and have come to their latest and most refined expression in practically the course of evolution so exhaustively illustrated in Mr. Spencer's books. In fact it is difficult to find in biological or other physical science more numerous and convincing proofs of the substantial accuracy of Mr. Spencer's all-embracing formula of evolutionary progress than are presented by the stories in our books of case-law of the germs, the advances and vicissitudes and ultimate crystallization of the now familiar doctrines of private municipal jurisprudence. Nothing is easier to understand than the passion for inductive study as exhibited in the case-system of legal instruction and in the laboratory method of psychological research. Facts first observed and then classified and generalized are more impressive than old theories revamped by new professors. The actual law of commercial paper is well-expressed, without doubt, in the "Negotiable Instruments Law," recently passed in several States; but the student who would master the principles of negotiability should seek his information in the adjudications which have developed this important department of the law. It cannot be wrong to ascribe the popularity of the inductive method of legal instruction very largely to the influence of Mr. Spencer.

Mr. Spencer, in common with many others of the laity, has been misled by the extravagant pretensions put forth by enthusiastic writers as to the nature and scope of the law. Our own legal system has been deliberately characterized as the perfection of human reason, and jurisprudence itself exalted as the knowledge of things divine and human. The mission of law has been stated to be the working out of the perfection of individual character. If it could effect this it would leave little scope for

the exercise of the religious and domestic virtues. The range of individual volition is certainly small when the State punishes offenses against God and religion as well as crimes against trade and manufacture. The conception of the state as *bonus paterfamilias*, and of statute as a panacea for social ills and the propagandist of an evangel which promises temporal and eternal salvation to all loyal citizens, has aroused the righteous wrath of Mr. Spencer and his school of philosophers.

We will not go far astray if we say that the law's scope is limited to external human conduct. The difficulties in the way of proof make this necessary. The traitor who imagines the king's death but who commits no overt act of felony stands uncondemned by any earthly tribunal by the side of the adulterer, who, by a lustful look, has committed sin in his heart. Many acts which are certainly prompted by revenge or inspired by malice often go unwhipped of justice, because the law cannot look upon the heart and learn its secrets. "Be pure in heart, or I'll flog you," said the master of Eton to his boys, announcing a rule which no discipline could enforce. The administration of justice must always remain imperfect in human societies, just as the law's expression of primary rights is at best only the aspiration and hope of weak, sinful and infirm humanity. This is not to be regretted. For human enactments are not to be regarded as the dreams of idealists, but as the stern dictates of political authority enforced by the police or military arm.

Sir Henry Maine was led to a life of scholarship through ill-health which incapacitated him for an active career in the practice of the law. He achieved the highest eminence as a publicist, jurist and man of letters. Sir Frederick Pollock, speaking of Maine, says: "I am bold to claim immortality for my master's work." Maine's literary style entitles him to rank with Addison and Macaulay as a writer of ornate and elegant English. There is nothing commonplace about him. Still it is not difficult to understand those who confess that they are unable to observe the profundity of his thoughts, who boldly arraign him for inaccuracy, or who see in his writings nothing but words. His generalizations are bold, his propositions suggestive and often purposely uncertain, and without doubt, many of his interpretations of Roman Law are fanciful and fallacious. One who undertook to examine all his works and put down in order the specific new propositions for which we are indebted to Sir Henry Maine would be grievously disappointed. Some

other writer has said, and I think with good judgment, that the lasting value and principal charm of Sir Henry Maine, is to be found in the marvellous suggestiveness of his style.

Maine's materials, too, were the most splendid monuments of human genius in legislation, the most refined and polished masterpieces in literature, and the noblest and most elevated expressions of moral sentiment that have been put forth by the leaders of the world's thought in politics, ethics, jurisprudence and philosophy. To elegant classic culture he added a good knowledge of the distinct systems of the civil, the canon and the English common law. Besides this, his official connection with the Supreme Council of India and long residence in the East furnished him with an opportunity to lay under tribute the wealth of Oriental learning in jurisprudence and politics. Jurisprudence, historical and comparative, has been introduced to English and American students and popularized by Maine, or at least illustrated and exhibited as a possible body of learning awaiting fuller development hereafter. The true method of the treatment of legal questions, namely, the historical method, has been indicated and emphasized. The student of Maine gets a panoramic view of law that is helpful and stimulating. By occasional glances at unfamiliar systems such as the Brehon Code and Hindoo jurisprudence, by a comparison of Indian, South Slavonian and Teutonic institutions, and by regular recurrence to the comprehensive rules of the Roman law, he is able to note the methods of legal evolution and discern the forces which have been making for change during the progress of centuries and millenniums. Nor is the advantage to be derived from such studies wholly ornamental. While historical studies exhibit law as a science and well-ordered body of doctrine, and connect jurisprudence with philosophy, ethics and even religion itself, they have the additional virtue of equipping the jurist and legislator for the duties that confront the law reformer of to-day. The very mass of legal literature is oppressive. No one can pretend to be familiar with it. It is obviously impossible to master the contents of fifteen thousand volumes. The student looks earnestly for every principle by which this mass of learning can be generalized. The official reviser of statutes labors long to secure the mastery of a legislative dialect, precise, certain, clear, uniform and unyielding. The codifier, now busier than ever in Europe and America, looks eagerly for rules of classification and scientific arrangement which only general jurisprudence can suggest.

The permanent value of Sir Henry Maine's work is, therefore, not doubted by any enthusiastic student of his books.

It is obviously impossible in a brief paragraph to set forth Mr. Spencer's fundamental principles as developed in the "Synthetic Philosophy," or even to indicate fairly what are his opinions and conclusions as stated in the "Principles of Sociology." He is the recognized apostle of evolution and argues for a theory that society is organic. His method is biological. He finds that social bodies have organs which carry on functions of sustenance, governance, reproduction and excretion. Society is an organism like an animal. Modifications wrought in social forms are through the influence of heredity and environment. Changes and progressive evolution are from an indefinite, incoherent, homogeneity to a definite, coherent heterogeneity through continuous differentiations and integrations. Life itself is the definite combination of heterogeneous changes both simultaneous and successive in correspondence with external co-existence and sequences.

Mr. Spencer is not unfamiliar with Maine's works. He has evidently studied them faithfully. Nor is he ignorant of English law, or Roman law, or ecclesiastical law, or the Pentateuchal jurisprudence, or the law of land and personal relations under the feudal *regime*. In fact one must contemplate with admiration and wonder the range and variety of his learning in the field of law, politics and economics. Spencer's method is strictly scientific, and has no high place for *a priori* speculation and metaphysical deduction. He is anxious to escape from inherited prejudices and prepossessions. To learn the natural and normal course of development he looks for man free from the dominion of modern civilization, and he therefore studies the untutored child of nature. The primitive man is of much interest to Mr. Spencer. He finds this primitive man among the most degraded savages at the uttermost ends of the earth and in the isles of the sea, among the Veddahs of Ceylon, the Andamanese, the Tasmanians, the Aleutian Islanders, the Bushmen of Africa, the Botocudos of Brazil, the native Australians, the North American redmen, and the Yakuts of Siberia. Spencer's studies are more anthropological than juristic. In absolute chronology he does not take us far back from our present generation. The savage institutions which form the main staple of his sociological work are gathered from the accounts of travelers mostly his own contemporaries. Many of these, not excepting some missionaries, are notorious liars, and have brought

back stories of the uncouth and the startling in order to interest their readers, and accounts of savage violence and atrocity in order to attract attention to their courage and resourcefulness, or increase their stipend from the subventions of philanthropic and religious societies. Human palæontology is as instructive to the sociologist as the psychology of the child-minded is to the professional pedagogist. The suggestion of religious theorists that savages of our day are degenerate and degraded specimens of races once civilized Mr. Spencer repudiates utterly. To the fables that there were giants in former days Mr. Spencer replies that man is taller, stronger, healthier and more long-lived now than ever before. This seems reasonable when we reflect that science has taught us to expel disease and ward it off by vaccination and various prophylactics; that sanitary engineering has provided for a generous flow of water, ample ventilation and prompt removal of waste, and that mankind is housed and fed as never before.

Nevertheless, Maine and Spencer have much in common. Each is preëminent in intellectual leadership. Each has marked excellences of style. Each is a student of institutions, believing that such knowledge is more valuable than dry details of personalities or idle words of hero-worship. Moreover, each has studied long and written much on domestic relations, parental authority and family life, so full of influence as these have been on legal development. Maine, indeed, while not adopting the technical speech of evolution, has nevertheless testified his practical acceptance of that theory, by illustrating its application to legal history. Nothing in this relation could be more impressive than the chapter in "Ancient Law" which shows how equity developed in England much as it did in Rome, and how fiction, equity and legislation have aided in legal evolution under the civil law and the common law alike.

In substance, these are the conclusions of Sir Henry Maine to which Mr. Spencer objects: That the patriarchal Estate is the earliest, and that implicit obedience to parents is a primary fact; that ancient societies regarded themselves as descended from one original stock, and that kinship in blood, rather than local contiguity, is the ground of their community in political functions; that in the infancy of society there were definite marital relations; that descent has always been in the male line; that the existence of government may be postulated from the beginning, and that political authority begins with patriarchal rule; that, originally, property is held by the family as a cor-

porate body, the patriarch holding his possessions in a representative rather than a proprietary character and exercising an unqualified dominion over his family; that perpetual tutelage of women characterizes the infancy of society; and that we need not take account of any stages in human progress earlier than the pastoral or agricultural.

Spencer is not an unreasonable critic of Sir Henry Maine, and expresses himself as "greatly valuing his works, and accepting as true within limits the views he has set forth respecting the family in its developed form, and respecting the part played by it in the evolution of European nations" ("Principles of Sociology," Vol. I, § 317). And again he says, in § 320: "Limiting our attention to the highest societies, we have to thank Sir Henry Maine for showing us the ways in which many of their ideas, customs, laws and arrangements, have been derived from those which characterized the patriarchal group."

Maine is criticized for not exploring a sufficiently wide area of induction, and Spencer proceeds with evidence discrediting some of Maine's conclusions, thus: The Brazilian Indian and young Bedouin are not habitually obedient to parents; the primitive relations of the sexes do not exhibit definite marital relations, but polyandry is found in Thibet, and promiscuity among the Andamanese; kinship is reckoned through females among the Tahitians and Kongans; some social groups have no governmental heads, as Fuegians and Eskimos; property is not held by the family as a corporate body in Dahomy and Congo, where kings, according to Spencer, have unlimited authority over the persons and property of their subjects; women are not in perpetual tutelage among the Karens, the Khasias, the Sea-Dyaks, the Nootkas, in Timbuctoo, and above the Yellala falls on the Congo; communities which have not reached the pastoral stage deserve study, but Spencer's observations regarding them are hypothetical and unsatisfactory.

We may safely accept Spencer's concession that all of Maine's generalizations which he criticizes are substantially safe and accurate so far as concerns the legal systems of the highest societies; and we may assume that Maine's scornful silence, only broken by a single reference in his "Village Communities," at page 17, to "the slippery testimony concerning savages which is gathered from travellers' tales" exhibits his indifference to the limitations of his doctrines which Mr. Spencer ventures to make. It is not difficult to see that the sociologist misunderstands the jurist; they are ages apart. It



is hard to conceive of law without a law-giver, of intestate succession before sexual jealousy enables us to ascertain paternity, of justice and mercy accorded to women and children by barbarians but long delayed by civilized Christians, of juristic science in the midst of savage troglodites, scattered over wide areas and without literature, history or traditions.

Spencer's discussion seems to be of law, but it is not. Yet no one can be named who has given to law a wider definition than Maine. Law is not always the creature of parliamentary wisdom, the finished product of legislative skill. Nor need we accept John Austin's analysis, which reveals a sanction in public force ever present, as applicable to the juristic philosophy of India and the Orient. Maine himself has suggested this limitation of the Austinian analysis in a criticism of the English positivist school which concedes the accuracy of their views as applied to the highly evolved legal systems of western Europe. When does law emerge from the chaos of prehistoric and shadowy institutions? What tests an observed institution and proves it juristic and not merely sociological? Who ever can answer these questions will understand both Sir Henry Maine and Herbert Spencer, and feel thankful to them both for their contributions to our instruction and enlightenment.

*Isaac Franklin Russell.*

NEW YORK CITY, May 1.

## FEDERAL CONTROL OF HYDRAULIC MINING.

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The question of the right and authority of the Federal Government to control mining by the hydraulic process to any extent has recently become interesting and important, particularly in the State of California, by reason of the efforts recently made by the United States authorities to enjoin gravel mining there, until the miner shall have submitted to the jurisdiction of a commission composed of engineers of the United States army appointed by the President.

Hydraulic mining, of itself, is and always has been recognized as a legitimate industry not subject to interference by the courts, except when it invaded the property rights of others.

It may be well to here observe, that hydraulic mining, as it is now and for more than thirty years last past has been conducted and understood in the mining regions of the western part of our country, is a process or mode of gold mining, by which hills, rocks, banks and other forms of deposits, composed largely of auriferous earth, are mined and removed from their position by means of large streams of water, which by great pressure are forced through pipes terminating in nozzles generally known as little giants or monitors. The water is discharged from these nozzles with great force against these bodies of earth, which are first frequently shattered or broken up by blasts of powder, and softened by streams of running water flowing at their base, loosening and tending to disintegrate them before they are further disintegrated and swept away by the great streams of water which are hurled upon them by the little giants or monitors. The clay, sand, gravel, stones and boulders of which these gold mines are largely composed, and known as mining *débris*, together with the gold itself which is mingled with it, are moved by these streams of water into and through flumes, sluices and other conduits near the mine, where the gold is arrested and the accompanying *débris* is carried through them and dumped or deposited into impounding basins or reservoirs. A part of this *débris*, depending upon the character of the impounding works—usually the lighter and more flocculent material—is carried beyond them and flows directly or ultimately

into the adjacent streams and canyons and thence to the larger rivers, some of it being frequently lodged either in the river beds or on the lands lying adjacent thereto.

It will readily be seen that this business, from its very nature, cannot be carried on without eventually doing injury, perceptibly or imperceptibly, to the streams, and often to the lands of riparian proprietors near them. Long continued mining by this process in the territory drained by the Sacramento and San Joaquin river systems, which ultimately lead to the Bay of San Francisco and thence to the Pacific Ocean, had resulted in lodging in these streams, their tributaries and headwaters, and upon thousands of acres of land adjacent to them, great quantities of *débris* which naturally resulted in impeding the navigation of many of these rivers, and injuring much of the lands lying along them. The result was a long and bitter litigation for years between the hydraulic miners on the one hand, and on the other the farmers and others owning lands adjacent to the streams used to carry off mining *débris*. In this litigation frequently, the public authorities were interested in their efforts to protect the navigability of these rivers. The courts of equity were time and again invoked to restrain the operation of hydraulic mines situated upon the various headwaters of the streams ultimately flowing into the Sacramento River; and in many instances where direct damage, either to the adjacent lands or the navigable waters were proven to the satisfaction of the courts, the operation of these mines by the hydraulic process was enjoined. In vain did the miners contend that the importance of their interests demanded especial consideration and extraordinary privileges, and that the inhibition of hydraulic mining meant incalculable loss and inconvenience, not only to the owners of such mines themselves, but also to the mining communities in which they were situated. They were met by the courts with the answer that these considerations were matters of judicial indifference. If public or private rights were being substantially infringed upon by this process of mining, it must stop regardless of the consequences to the miner or to the community in which his business was carried on; and the courts refused to make a comparison of the value of the conflicting rights, as the mode of determining their legal superiority.

The decisions, however, were not always adverse to the mining interests. An inherent and sometimes unsurmountable difficulty in this class of litigation, was the procurement of proof by complainant satisfactory to a court, that any particular

mine thus proceeded against was doing the damage complained of. These contests increased in number and bitterness, and finally the United States itself made an effort to prevent the further impairment of the navigability of certain streams, by prosecuting an action in equity for an injunction against the owner of one of the largest and most important gravel mines in California—The North Bloomfield Gravel Mining Company. This company had formerly in another suit, brought by a private party, entitled *Woodruff v. The North Bloomfield Mining Company*, 18 Fed. Rep. 753, been judicially prohibited from working its mining ground by the hydraulic process, until it could satisfactorily show to the court granting the injunction that it had constructed impounding reservoirs which would successfully restrain its tailings or *débris*; and it had thereafter, by constructing a vast and expensive system of impounding works in a manner satisfactory to the court, recommenced its mining operations. After a long trial of the case, instituted by the Government, in which much testimony was taken, the United States Circuit Court for the Ninth Circuit found as a fact that, by the new system of impounding works, the North Bloomfield Company was enabled thereby to restrain any *débris* resulting from the operation of the mine which could injure the navigability of any of the streams used by it, and the injunction prayed for was denied (*U. S. v. North Bloomfield Gravel Mining Co.*, 53 Fed. Rep. 625). In these as well as in other cases the courts were careful to observe that hydraulic mining, of itself, was not only a lawful but also a commendable business when so conducted as not to injure the rights of others.

Such, in brief, was the condition of hydraulic mining in the State of California when the act of Congress to which I shall shortly advert became a law. Nobody there wanted hydraulic mining stopped if it could be carried on with due regard to the property rights of others. Steps were thereupon taken to bring the conflicting interests together, and the miners in convention assembled suggested to the farmers and those interested in the preservation of the navigability of the streams, as a compromise, that, recognizing as they did the binding effect of the decrees of the courts, the determination of the question whether such mining could be safely carried on without injury, and if so, where and under what conditions, be left to an impartial commission of Government engineers who should be the judges of the facts and whose determination should be final. To this the farming and agricultural interests consented, and the result was

the passage by Congress of the act of March 1, 1893 (27 U. S. Stats. at Large, p. 507), commonly known as the "Caminetti Act."

My space is too limited to give even an abstract of this act and I can only mention some of its principal features. It is entitled "An Act to create the California Débris Commission, and regulate hydraulic mining in the State of California," and provides, *inter alia*, for the appointment of a commission composed of three army engineers to act under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States Army, and to supervise hydraulic mining in the territory drained by the Sacramento and San Joaquin river systems, so that no injury might be done to the streams and property adjacent thereto; as well as to make a study of and determine upon plans for the improvement of the navigability of all the rivers comprising this system, in order to preserve them against damage from mining débris, and, if possible, restore them to the condition in which they existed in 1860.

The commission, by this act, is further charged with the duty of investigating the feasibility of establishing storage sites in the tributaries of the Sacramento and San Joaquin rivers, or low lands adjacent thereto, with a view to the further protection of the navigability of all these streams; "and in general to make such a study of and researches in the hydraulic mining industry, as science, experience and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid."

The act inhibits and denominates as a criminal offense the conduct of hydraulic mining in the territory hereinbefore referred to, which directly or indirectly injures the navigability of these river systems, other than such mining by this process as may be permitted by the débris commission, and further provides that every owner of a mine in the territory mentioned which it is desired to work by the hydraulic process, must, in a prescribed manner, submit to the jurisdiction and general direction of the commission as far as the means and methods of impounding its débris is concerned.

This act, however, was not suffered to go unchallenged. The North Bloomfield Gravel Mining Company, heretofore mentioned, determined that the importance of its interests would not allow it to submit to the jurisdiction of this or any other commission, and, contending that its system of impounding works

was, and had been heretofore, judicially declared sufficient, and that it did not injure the streams directly or indirectly, refused to execute and file with the duly appointed commission of engineers the petition and instruments provided for by the act, surrendering to the United States the right and privilege to regulate by law the manner and method of impounding the débris resulting from the working of its mine by the hydraulic process.

In order to test the act of Congress before referred to and upon the relation of the débris commission, an action was instituted by the United States in 1895 for an injunction to restrain the operation of this mine by the hydraulic process, until it should have complied with the act before mentioned. No damage to the navigability of any streams was directly alleged in the bill, but it was averred that the mining company was using certain streams leading into navigable rivers, and forming a part of the Sacramento River system, for the purpose of floating off some of its tailings. The company demurred and then answered, contending first that the act was not mandatory in its requirements upon the miner but permissive only; secondly, that if it was to be construed as mandatory it was unconstitutional, as transgressing the commercial powers of Congress and trenching upon State rights; and thirdly, that a court of equity would not enjoin hydraulic mining unless actual or threatened and irreparable damage was alleged and proven. On the miner's behalf it was argued that the court might as well enjoin a farmer while plowing from turning a few feet of soil into an adjacent stream, or a saw mill from using the streams for carrying away its sawdust and shavings, as to enjoin a gravel miner from floating diminutive particles of débris that only discolor the water, do not impair its commerce and float with every current, resting nowhere until they reach the ocean. The company averred in its answer that its mining operations performed no injury to the navigability of the streams, and that only light, flocculent matter, ultimately carried out into the ocean by the currents, left the company's impounding works and reached the streams.

The Government was content to rest its case largely upon the admission in the defendant's answer, of the use of the navigable streams to some extent, and claimed that the history of the times, as well as the verbiage employed, showed that the act was designed to be mandatory and within the constitutional powers of Congress granting it the right to regulate interstate

commerce. It was further urged in the Government's behalf, that it was for Congress and not the courts to determine what was and what was not an injury to the navigability of the public waters capable of floating interstate and foreign commerce, and that the passage of the act in question was an authoritative and final declaration by Congress that any hydraulic mining carried on in the country drained by the Sacramento and San Joaquin river systems was an injury to the navigability of these streams when not regulated by the commission appointed under the provisions of the act under consideration. Congress had not only legislated for their protection by passing this act but had also provided for their improvement by the various River and Harbor Acts especially those of 1886, 1890, 1894 and 1896.

On June 8, 1897, Judge Ross of the Circuit Court for the Ninth Circuit rendered his decision, sustaining the contention of the Government throughout and upholding the act (*U. S. v. North Bloomfield Gravel Mining Co.*, 81 Fed. Rep. 243).

From this decision the mining company took an appeal to the Circuit Court of Appeals for that Circuit, which was argued at the February, 1898, term, and will probably be decided about the time this article appears in print. There can be but little doubt that the appellate court will also uphold this act, construing it as mandatory and not merely permissive, and declare the absolute power of Congress to regulate the impounding of débris from any mine which uses the public streams of the nation directly or indirectly, as conduits in carrying away its refuse, no matter how imperceptible or trivial this use may be, or how insignificant, if at all, the damage resulting therefrom may appear; for, as the learned Circuit Judge observed, "The power to absolutely prevent the use of such waters for objectionable purposes necessarily includes the power to prescribe the terms and conditions upon which they may be so used," which the act of 1893 was designed to accomplish.

The decision in this case will authoritatively settle the question of the authority of Congress, or its duly appointed Governmental agents, to regulate and provide methods of impounding mining débris in the territory referred to, and thereby establish the right of the Federal Government to control hydraulic mining at least to this extent; for the right of Congress to either itself arbitrarily declare what is and what is not an injury to the navigable capacity of a public stream of the United States open to interstate or foreign commerce, or to delegate this power to one of its duly-appointed agents or arms of Govern-

ment, such as the Secretary of War, or a board of engineer officers, is now too well settled to be open to serious dispute.

The courts held the absolute prohibition against the exportation from the United States of merchandise to England, under the "Embargo Acts" preceding the war of 1812, was a constitutional exercise of the power of Congress despite the opinion to the contrary of such eminent men and profound lawyers as Samuel Dexter and Daniel Webster.

The decision by the proper officers of the Government that a bridge across Rock River, Illinois, was an obstruction to commerce on it and hindered the work of the improvement of the stream, despite the fact that the bridge was erected under State authority, was held sufficient to enable the United States Government to maintain a criminal action against the city of Moline for maintaining an obstruction to a navigable stream under the River and Harbor Act of September 19, 1890 (26 U. S. Stats. at Large, p. 624; *U. S. v. City of Moline*, 82 Fed. Rep. 592), and the failure of the Secretary of the Treasury to include a certain kind of tea among the list of those whose importation was provided for by his regulations, where an act of Congress delegated that power to the Secretary, did not serve to render such act invalid or unconstitutional or constitute an unjust discrimination against any one, although no reason appeared for the omission (*Sang Lung & Co., et al., v. The Collector of Customs, etc.*, 85 Fed. Rep. 502).

As the Circuit Court there observed, the power of the Government to act arbitrarily in shutting out or admitting an article of commerce was complete and not reviewable in the courts; and upon a like principle and by the same course of reasoning, and under the same constitutional authority, the power of Congress or its duly delegated agents to arbitrarily determine what is and what is not an injury to the public navigable streams or their navigable capacity, and upon what terms such streams may be used, if at all, seems equally clear, and appears now to be judicially settled beyond question.

The action which has been taken by Congress in this matter is in the right direction. It is now the province of experts and not of mine owners on the one hand or of interested farmers or riparian owners on the other, to determine whether, and if so how, hydraulic mining in the territory containing most, if not all, of these mines in the State of California can be carried on without creating damage to the others; and this legislation is in line with the present efforts of miners and others interested in



this important branch of industry, to have a Department of Mines created by the Federal Government coördinate with the recently-created Department of Agriculture and having like powers and authority.

*Samuel Knight.*

[NOTE.—Since the foregoing article was written the Circuit Court of Appeals for the Ninth Circuit on the second day of May, 1898, affirmed the decision of the Circuit Court in the case brought by the United States against the North Bloomfield Gravel Mining Company.]

## A SKETCH OF THE EVOLUTION OF ALLODIAL TITLES IN HAWAII.

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The feudal system of land tenure in England had a curious duplicate in the system evolved by the Polynesian race, on the Hawaiian Islands, probably the most remote spot on the seas, excepting the much-sought Arctic poles.

This civilization came to the Hawaiian Islands from the south twenty-one generations before the present century. Tradition tells of frequent voyages in double canoes from the Samoan Islands, and the bringing of pigs and chickens on these long voyages to the islands, where they were about the only vertebrates found by Captain Cook. There is no tradition, however, of any of these adventurous colonizers bringing with them Coke on Littleton, Blackstone, nor any learned work on the feudal land tenure. It is not generally believed that Kamehameha I. (who flourished as a contemporary of Napoleon, whose miniature counterpart he was) had ever been a great student of Blackstone; oh, happy man! We are not informed that he ever heard of William the Conqueror, or of the battle of Hastings, or of the Domesday Book.

Therefore, we can claim that the great warrior, or his predecessors, built up their system of land tenure, without consulting the eminent authorities, and what similarity there is between the Hawaiian and the feudal system is the result of applying the most ready solution to the same problem.

Hawaiian history does not show that Kamehameha I., pored over the account of William's landing on the English coast, and defeating the flower of English chivalry there, and then closing the book, rolled up his feather cloak, ordered his canoes and started for Honolulu, Oahu, to repeat the performance, and drive the last remnant of resisting local chiefs up the narrowing Nuuanu valley, back of Honolulu, and over the precipice, the famous *pali*. But he could not have better imitated his prototype if he had.

Like William, Kamehameha I., was a man of commanding person, political sagacity and generous to his friends; like Napoleon, he fought his way from comparative obscurity. Kameha-

me ha portioned out the various islands to his chiefs in return for a certain portion of the fruits of the soil, which they were to give him. The greater chiefs, in turn, divided their great tracts to their favorites, retaining a portion of the produce as rent.

The land so passed through four, five or six hands, until the wretched common kanaka found, himself the actual tiller of the soil, that he was allowed to live on, only during the will of his superior lord. From the produce of this labor he was allowed to retain only enough sustenance to keep himself alive to work another day for his superior lord.

There was no stability in the system. The tenancy lasted at the will of either party. Unlike the serfs, the kanaka might emigrate whenever he chose. No ties of fealty, nothing that resembled the banding together of warriors for defense and selecting a chief is found in their customs. It was rather a thorough, and consistent carrying out of the spoils system from top to bottom of the Hawaiian despotism, a machinery built up and operated by the chiefs with the aid of their *kahunas*, or priests. The government in Hawaii was more highly organized than any other in Polynesia, and consequently the chiefs were more powerful. When the king died there was an entirely new distribution of lands, down to the poorest native, on whom the burden of all expense ultimately fell ("The Polynesian Race," by Fornander, Vol. II., p. 300). The native had no right to the small *kuleana* or patch of *taro* land on which he labored up to his waist in mud and water, and built his grass hut, but might be dispossessed at any moment on refusing to continue any of the many menial tasks he was required to perform on his chief's land on stated days of each moon, or for the king on his lands.

This same relation existed between the lesser chiefs and the greater, and between them up to the king. In short, it was a government by "pull" with the conqueror, or "boss." The same motive of selfishness ruled them among the bronze half-civilized barbarians, that now gives motive power to the highly-organized machine that governs the centers of civilization in America.

The title to all lands rested in the king personally; there was no distinction between the private property of the king and that which he held as the representative of the state, a distinction not recognized till 1840. He, only, held the allodium in all lands of Hawaii. His consent was necessary for any transfers of real estate, or for real mortgages also. All lands forfeited for non-payment of taxes reverted to him (Old Laws, p. 179). He was

the source of all title, as he is now, if we trace back title sufficiently, as will be shown hereafter.

The kings of Hawaii were the only men who knew the law, for the law depended on their arbitrary decrees constrained only by what they feared to do. The only notion the Hawaiian had of law, other than the capricious will of the chiefs and king, were certain customs in regard to water-rights, attached to the lands, wherefore, it is reasonable to understand why the Hawaiian word for law is *Kana-wai*, pertaining to water.

The method of dividing the lands among the chiefs was strangely similar to that of William the Conqueror, and the method of dividing the lands a peculiar system, adapted to the physical features of the islands. The five greater islands are especially volcanic in their structure. Maui, for instance, seems to be made up of two great volcanoes joined together by a low isthmus. In the center of these two parts are craters, one the famous Haleakala. The lands are divided with regard to the surface of these great mountains.

The greatest division is a *moku*, or district dividing some islands into six parts, each comprising many *ahupuaa*. The *ahupuaa* may be described as a slice out of the side of the mountain, as if one cut each great volcanic mountain on each island into slices of cake, varying greatly in width. Suppose that the cake have placed in the center of it an elaborate candy design with a point in the middle of the coveted center that occupies, perhaps, one-eighth of the diameter; then suppose that the distributor of the cake, representing the conqueror, give to certain two or three favorites very wide slices and divide the candy center among the three favored ones. Now suppose that the fruit and frosting around the margin of the cake be also divided among these favored ones, and the less favored are content with their small slices, cut off at the center, and without the coveted frosting on the circumference.

These slices are called *ahupuaas* and constitute the greatest unit of division of land. The ordinary *ahupuaa* runs from the sea up the side of the volcanic mountain into the timber limit, and into the jungle a mile or two, and there it is cut off by the greater *ahupuaas* which likewise extend from the sea to the mountain forests, and there broaden out beyond the regular lines cutting off the smaller *ahupuaas* from the summit of the mountain and dividing the whole of the central forest, fringing the mountain, among the few, the center of the cake is theirs. The right to these forests is indicated by the grant from the

king of the exclusive right to cut *aho* and collect cordage, or to take the *oo*, a bird much prized for two or three yellow feathers its bears, valued for making the feather cloak, a sign of rank; another *ahupuaa* might have the exclusive right to take sandal wood within certain limits of the forest. The lines of these great *ahupuaas* come together at the top of the mountain, often at some well-marked point, or crag on the edge of a crater like the *Palaha* on the crater of Haleakala, East Maui, where eight great *ahupuaas* from as many districts converge (W. D. Alexander's article in "Thrum's Annual," 1891, p. 105). The small *ahupuaas* suffer the same curtailment, *makai* (toward the sea). The great slices of land have attached to them ocean fishing rights, not only on their own shores but spreading out on each side up and down the rocky coasts for miles, till they join another monopoly of the deep-sea fisheries. They possess the exclusive right to fish in the ocean for a mile out to sea from the depth where a man can wade. The small slices carry only the right to fish where a man can wade up to about five feet. Some of the *ahupuaas* are granted by metes and bounds one mile and a half out to sea. These slices of land, it will be noticed, embrace all kinds of land dear to the kanaka heart—fisheries, their principal flesh food, low land, well watered, which the kanaka works into tiers of square ponds, draining one into the other, where he grows his *taro*, a water plant of great bulbous root, weighing two or three pounds. He boils these and crushes into a paste with water, and allows it to ferment, until it becomes of the consistency of kite paste, as the boys would call it, and of a slate or pink color. With the fish and poi, a native wants little else, except a few yams, bananas or mangoes grown on the dry or *Kula* mountain land above, and a right to cut wood in the bit of forest on the upper part of the *ahupuaa* for fuel, and to obtain bark for *kapa*, native cloth.

So much for the comfort of the baron or lord of the *ahupuaa*, his friends and family servants, but the laborers on his lands are to be provided for. In some cases narrow strips of shore and mountain land were rented to the greater subordinates, but this was not always practicable and the common kanaka must be provided with *taro* and *kula* lands for his wants. This was accomplished by allowing a kanaka to have a little patch of an acre or two in the rich *taro* land, and a share in the precious water running by, so that on seven or eight or more days of each moon he might flood his *taro* patch. Such land, near Honolulu, now sells sometimes for over one thousand dollars an acre. The

kanaka knew his land not by metes and bounds, but by a particular name, such as *Popoke* (poor pussy), *Honoku* (turtle back), and other names some of which would hardly bear translation for their obscenity. It was necessary to provide dry lands for the same native, which could not be done without jumping from the lowlands several miles into the mountains. Another patch usually larger than the precious *taro* land, will be found by the same name up among the dry lands, where a stone wall may inclose some yams and bananas. This patch is called a *lele*, or jump, of the same *Popoke* patch below, both pieces are sometimes conveyed by the name merely, often without indicating that there is more than one piece.

Within many *ahupuaas* were also larger divisions of land, located anywhere within its boundaries, called *ili aina* (skin, or hide-land). What similarity there may be to Vergil's story about the widow, Dido, and the measuring of Carthage as an *ili* or *tergum* of land, I leave to archæologists. These *ili ainas* were spotted, like the measles, with small *kuleanas*, or claims of the common kanaka, as mentioned above. The ordinary *ili* was merely a division of the *ahupuaa* for the convenience of the chief of that greater division, with an agent, or *konoliki*, to manage it, who brought the revenue to the chief.

Another kind of *ili* was the *ili kupo* (skin standing right), or independent *ili*, which was independent of the chief of the *ahupuaa* and held directly from the king, and paying tribute directly to him.

The *ilis* sometimes scattered over nearly the whole *ahupuaa*, as one might carelessly throw chips on a pail of water and find nearly the whole surface covered. Thus the *ilis* of *Waikoloa* and *Puukapu* (forbidden hill) occupy nine-tenths of the area of the *ahupuaa* of *Waiimea*. The grant of the *ahupuaa* would carry all the lands within its radial lines, excepting *ili-kuponos*, or independent *ilis*, whatever area that might have.

Such was the condition of the land system when the American missionaries landed in 1820, and inaugurated an era of progress, in worldly, as well as spiritual affairs. In 1839, 1840, Kamehameha III. was induced to issue an edict that the *kuleana* men or common kanakas should not be deprived arbitrarily of the lands they cultivated, but this proved inadequate. The vicious system continued.

As civilization advanced Kamehameha III., on the advice and instruction of his disinterested and wise counsellors, saw the objections to the system of land tenure, by which all title to land

was in him, subject to taxes and revenue for himself as well as for the expenses of government, all of which went into the same pocket, if he had one. The need of some record of the lands of his kingdom, and of its subdivisions, was pointed out to him; as also, a record of the occupiers of these lands (Estate of His Majesty Kamehameha IV., 2 Hawaiian Reports 715; W. D. Alexander in "Thrum's Annual" cited above).

Accordingly, in 1846 a commission was established by Kamehameha III. to quiet the land titles of the islands. This board of five commissioners was established for the investigation and final ascertainment, or rejection, of all claims of private individuals to any landed property acquired prior to the act, 1846 (1 Statutes of Hawaii, p. 107). All claims were forever barred unless presented to this board by February 14, 1848, and the land of the *ahupuaa* reverted to the government, or of the *kuleana* in the *ahupuaa*, or *ili*, to the holder of that body of land. The award of the commission was final unless appealed from. Its existence was limited, and it proceeded with great industry to the enormous task before it of settling the 12,000 land claims on the eight islands, which it completed in 1855.

It established an elaborate set of principles in its adjudication of claims presented to it. The nature of Hawaiian tenure of land and the history of its development, which I have merely outlined, is accurately stated in Statutes of Hawaii, Vol. II., p. 81, 1846.

The holders of the *ahupuaas* and *ilis* were very anxious to free their lands from all other claims, and willingly gave up one-third of their lands in return for an allodial title to the remainder, thus indicating the good sense of the aristocracy.

Of course it was impossible for the holders of the *ahupuaas* and *ilis* to determine the area of their lands until the scattered *kuleanas* within them were determined. This was necessarily done hastily, and few competent surveyors were to be had. C. J. Lyons, in his articles in the *Islander* of 1875, gives an interesting narrative of the methods employed from personal knowledge as an expert surveyor. The distances were sometimes measured by fifty-foot chains and the direction established by a pocket compass, or in one case, in Land Commission's Award 17, Royal Patent 130 to E. Jones in Honolulu, the bounds were read off from a mariner's compass. Any natural feature, however ephemeral, was noted—as guava trees, as frail as willow trees in New England. The description might be as follows: Beginning at a guava tree on the N. E. corner of this land and

running N. W. half W. per mariner's compass 1 chain 55 ft. to the S. corner of the pen of the missionary cow, near Kawaiaha; thence along back of same N. E. about 1 chain 3 feet to a hala tree marked X; thence S. E. by E. one-fourth E. about 92 feet, etc.

The direction, whether magnetic or true meridian, is often omitted, and the local variation which is great near great lava flows, is seldom noted. Several methods are sometimes noted in one survey. The same surveyor did not take a whole district, but each worked out his own plans independently of all other surveys, as at Waikiki, where the overlapping and failure to join is a fruitful source of litigation to-day.

With this inaccuracy the difficulty of the owners of *ahupuaas* may be imagined. The problem that faced them was like answering the question, What is the area of the white on the ten-spot-of-spades without knowing the area of the spades? Add to this the fact that a smaller eight-of-clubs might be placed on top of the larger card, and the problem of the holder of the *ili* inside the *ahupuaa* may be imagined.

The result was that the land commission was empowered to grant titles to *konohikis*, or agents of chiefs, for whole "*ahupuaas* or *ilis* received by them in *Mahele* of 1848 by their proper names without survey." These names were such as *Kealakekua* (the paths of the gods); *Kauhako* (the bowels that were dragged).

This leads us to a most remarkable peaceful revolution in the land tenure of Hawaii by which the embarrassment of land titles was relieved and all titles became allodial.

The award of the L. C. A., as it is called for short, gave the holder a right to pay one-third of the value of the land, as a commutation of the government interest in the tenant's land. The chiefs still held their larger claims from the king, and were anxious to secure an allodial title. After a historic debate of the king and chiefs in Privy Council in December, 1847, the chiefs decide to surrender to the king the greater part of the lands held in fief by them, in return for an allodium in the remainder, but that was accomplished by two steps. The first step was the great *mahele*, or division by which a committee arranged by mutual consent of the king and each chief, a settlement that was to be final. The landlords were to receive one-third of the lands held by them, as their share. The record of this division was kept in the *Mahele Book*, the Hawaiian Domesday Book, which consists of lists of lands by name belonging to the king, and chiefs to which mutual quitclaim deeds are



subjoined by which the king released all his feudal rights in the chiefs' lands (see the learned opinion of Hon. A. F. Judd, now Chief-Justice (Yale '62), in *Harris v. Carter*, 6 Haw. 198). The allodium was not even then in either the king or the chiefs.

The chiefs were required to present their claims to the Land Commission for award, upon which they might secure an allodial title to their lands in a Royal Patent, upon paying a commutation to the Government for its interest in the lands (*Kanoa v. Meek*, 6 H. 63). At the close of the *mahele*, or division, the lands of the king reserved to himself to which the landlords or chiefs had quitclaim, were not regarded by him as his private property. "Even before his division with the landlords, a second division between himself and the government or state was clearly contemplated" (*Estate of His Majesty Kamehameha IV.*, 2 Haw. 722). The king seems to have realized the value of separating his private property from that property held by him as the representative of the state, and to have appreciated the danger of confiscation of public lands, including his own, in case of conquest by a foreign power. He also appreciated the value of complete control over his own property. Impelled by these motives, and apparently by a broad view of the interests of his kingdom, in 1848 he set apart for the use of the government the larger part of his royal domain, afterwards known as government land, and reserved to himself a reasonable amount, as his own estate, known since as crown lands. These deeds are both contained in the Domesday Book of Hawaii, called the *Mahele Book*, or *Book of Division*.

In 1850 the chiefs followed the example of their king, and gave up a third of their lands to the government which was accepted by the Privy Council August 26, 1850, as full computation of the Government right in the remainder of their lands; thus the chiefs obtain an allodial title.

The grants of the *ahupuaas* and *ili* expressly reserve the rights of tenants, "*koe na kuleana o kanaka.*" In 1862, a boundary commission settled the limits of those *ahupuaas* and *ilis*, awarded by name.

The common people were guaranteed the right to water and the right of way over the lands of their chiefs, or *konohikis*. The same act of August 6, 1850, confirms the resolution of the Privy Council on December 21, 1849, granting a fee simple title, *free of all commutation* to all native tenants for their cultivated lands and house lots, except town lots in Honolulu, Lahaina and Hilo (W. D. Alexander in "Thrum's Annual," 1891, p. 115).

Thus three classes of the kingdom obtain allodial titles, since which time the government has been industriously locating and mapping the lands of Hawaii, and bringing order out of chaos under the able supervision of W. D. Alexander, Yale '55, Surveyor General. The government maps of *ahupuaas*, locating *kuleanas* look like crazy quilts, but still the greater lands are now approximately correct in their calculation of areas.

Now and again, a blind or deaf old *kamaaina* (oldest inhabitant) is hunted out of his grass hut or cabin, and placed on the witness stand to locate a doubtful *kuleana*. He is urged to tell the court where the pig pen used to be, or the guava tree, since succeeded by a jungle of others; where the missionary cow had her pen, or the ever-changing bank of the stream its ancient line. In the desire to please, he may answer, "It was just where you would like to have it, judge," and the court does the best it can to locate that particular spot on the ten-of-spades, and the occupants of others sigh for the twenty years of adverse possession to settle their *pilikia*.

*Philip L. Weaver.*

HONOLULU, H. I.

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THE United States constitute a sort of laboratory of large and small democracies, political and municipal, in which it not only possible to try a good many valuable experiments but almost impossible not to try them. And there is hardly a problem in the organization of state or municipal government the solution of which has not been tried under conditions which make the experiment useful and memorable. It is thus with no little interest that the country watches the use of the referendum in California. That State is just now making an extremely interesting experiment in government, and one that promises to work very well. It is nothing less than dispensing with a constitution in the old sense and substituting two classes of laws—one of more importance and authority, adopted by the people; and the other of less, enacted by the legislature. This results from the fact that the new constitution, adopted in 1879, was really, as has so often been pointed out, not a constitution but a code of laws, regulating with minute detail many of the affairs of life. And as soon as the new government set to work under this constitution so soon the elaborate rules began to hinder it. The courts found many of the rules unconstitutional and relieved the Legislature of them. But nevertheless something more had to be done, and the only way to do it was by amending the constitution. This change required a majority vote of the people. So the people glided into the easy path of constitutional amendment and use of the referendum.

Since the present constitution was passed there have been introduced into the Legislature four hundred and eighty-six

amendments. Of these thirty-four have been submitted to the people, seventeen adopted, eleven rejected and seven are pending. And of the seventeen adopted it is safe to say fifteen at least effected an improvement on previous existing conditions. Of course this process of popular law making under constitutional forms has made more hazy the general knowledge of the actual state of the fundamental law, but there is growing up a body of law which is comprised in a manageable bulk and grounded on popular approval.

And now the City of San Francisco, by the election held on May 26th, has also adopted the referendum. Whenever a petition, signed by fifteen per cent of the voters of the last election, asks that an ordinance therein set forth shall be submitted to vote, the election commissioners must submit it at the next election. If the majority of those voting shall favor the adoption the ordinance shall become a law. The referendum also is provided in regard to ordinances involving the granting of all the more important franchises. Such ordinances are not valid until approved by a majority of the voters at the next ensuing election.

This new charter was carried by but a small majority and its opponents prophesy its speedy failure, and point to New Jersey as furnishing an illustration of the unsuitableness of the referendum for this country. However, it has worked well in the State of California and its further development in San Francisco will be closely followed by students of American municipal government.

\* \* \*

THE Supreme Court of the United States has very recently reversed decisions which will effectually put a stop to much of the anti-oleomargarine legislation which has of late been enacted by States of the Union. The laws of Pennsylvania and of New Hampshire are declared unconstitutional and void. The former prohibits the introduction of this article into the State. The latter provides that when colored pink there shall be no prohibition. The Supreme Court, speaking through Mr. Justice Peckham, reverses the decision of the State courts, holding both laws in contravention of the Federal Constitution. The provision of the New Hampshire statute is rejected as being a mere evasion. By virtue of the Court's decision on the Pennsylvania statute oleomargarine cannot be denied admission to the State as an article of food. The article thus may be imported from any State and sold in any size or form of unbroken package. The prohibition of the State on oleomargarine manufactured within

the State still continues unimpaired, but manifestly this statute becomes ineffectual in its main purpose, that of excluding the article from the market.

The Supreme Court recognizes oleomargarine as an article of commerce, and a wholesome food and says: "A lawful article of commerce cannot be wholly excluded from importation into a State from another State where it is manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure the purity of the article imported, but such police power does not include the total exclusion even of an article of food."

\* \* \*

THE effect of war upon contracts with the Government for war material, food, etc., is a question that has received little consideration in the Courts. Because of its necessities, the urgent haste demanded in fulfilling the contract, and the right of the Government to be supplied before all others, if it so requires, the Courts should protect such contracts in every way. In *American Ordnance Co. v. Seabury Gun Co.*, recently decided by Judge Townsend in the United States Circuit Court for the District of Connecticut, a preliminary injunction for the infringement of a patent was denied for this reason. The defendants had a very large contract with the Government to furnish guns of a certain kind, which plaintiffs claimed were an infringement of their patent. Judge Townsend, in refusing the injunction, said: "I am not satisfied that the defendants' proposed construction will not infringe certain claims of the patent in suit. But as it is admitted the defendant is financially responsible, the motion will be denied on the ground that the defendant is under contract to furnish the guns in question to the Government of the United States within six weeks from the present time for use in time of war for coast defence and and under the presence of immediate and impending danger."

\* \* \*

MR. KNOX MADDOX has been elected Chairman, and Mr. C. H. Studinski, Treasurer, of the LAW JOURNAL for the coming year.

## COMMENT.

In his recent article on "Some Constitutional Questions under the Federal Anti-Trust Law," 7 YALE LAW JOURNAL, 289, Mr. Edward B. Whitney doubts very much whether the Anti-Trust Law will be held applicable where the contract in restraint of trade is merely ancillary to a sale or lease of a business. *Ebel v. Brett*—a case recently decided by the New York Supreme Court, Appellate Division, bears out Mr. Whitney's conclusions and may be an indicator of the result the United States Supreme Court will reach when it comes to decide the same point. For Mr. Justice Peckham in his opinion in *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, 329, admits that "A contract, which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which, in effect, is collateral to such sale, and when the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute." In *Ebel v. Brett* one ship broker sold to another all his interest and good will in the business of freighting vessels for Port au Prince, agreeing for a specified time not to solicit freights for that place and the Court held that the Anti-Trust Law did not apply. From the joining of the word "contract" with the words "combination" and "conspiracy" in the Statute, it is clear that it was aimed at trusts and monopolies, and contracts which are directly in restraint of trade. As Judge Barrett says: "It certainly was not intended to prohibit a man from selling his business in the ordinary way, and from thereupon obtaining the full value thereof through the instrumentality of an incidental covenant not to compete with the purchaser within some limited area." *U. S. v. Addyston Pipe and Steel Co.*, 85 Fed. 271, is another recent case analogous but not deciding the same point.

In the attempts which are constantly being made to raise the standard of physical health, and to so restrict the practice of medicine as to best conduce to this end, an important advance has been made in *Hawker v. People of the State of New York*, 12 U. S. Supreme Court. Advance Sheets, 609, which arose under a statute making it a misdemeanor for any one to attempt to practice medicine after a conviction of a felony. The plaintiff in error had been so convicted several years before, and had served out his sentence thereunder. It was here held that this statute was not an *ex-post facto* law, increasing the punishment, but simply a valid exercise of the police power; under which the State could require moral qualifications for the prac-

tice of medicine, and could make a conviction of felony conclusive proof of a lack of such morals.

This case is a very good example of the disinclination of the courts to restrict the exercise of the police power of a State, especially when it is directed toward the preservation of the public health. As the population increases, it is one of the most important and difficult functions which the State must perform, and since the right to practice medicine is entirely dependent upon legislative permission, the State may require a good character as a necessary qualification as well as mere knowledge of the theory of medicine. If by so doing the number of unworthy practitioners can be decreased the benefit accruing to the public in general will be sufficient to more than offset the injustice done by such a law in some cases.

## RECENT CASES.

## CONTRACTS.

*Release of Surety on Supersedeas Bonds—Agreement for Settlement.*—*Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper*, 85 Fed. Rep. 620.—A judgment was recovered against a railroad company, and pending proceedings to review the company paid to the plaintiff a sum in cash, and delivered certain bonds in escrow, on an agreement that, if the bonds should advance in market value to par within a year, they should be accepted by the plaintiff in full satisfaction of the judgment. They failed to reach the stipulated value and were tendered back. The proceedings in error were not dismissed, but resulted, after the expiration of the year, in an affirmance. *Held*, that such transaction did not discharge the sureties over defendant's supersedeas bond. Pardee, Circuit Judge, *dissented*, on the ground that the argument for delay between the principals released the sureties, unless it was done with their consent.

*Street Railroads—Transfers—Rights of Passengers.*—*Jenkins v. Brooklyn Heights R. Co.*, 51 N. Y. Supp. 216. A New York law compels certain companies to give transfers to their passengers for one continuous trip without extra charge. Under this law it is not a reasonable regulation for the company to adopt an arbitrary time limit within which such a transfer must be used and a person holding such a transfer is justified in waiting until a car comes along in which he can secure a seat.

*Injunction—Building Restrictions.*—*Alvord v. Fletcher*, 51 N. Y. Supp. 117. Two parcels of land were subject to the same covenant, which restricted the class of buildings to be erected thereon and their distance from the street. The fact that the owner of one of them is maintaining thereon a building which violates the covenant justifies the court in refusing him a preliminary injunction restraining the owner of the other parcel from committing a similar breach.

*Maritime Liens—Priority—Supplies.*—*The John G. Stevens*, 18 Sup. Ct. Rep. 544. A lien for damages on a tug for negligently allowing the tow to come into collision with another vessel will be given priority over a lien on the tug for supplies previously furnished. All interests existing at the time of the collision in the offending vessel—whether by way of part ownership, of mortgage, of bottomry bond, or of other maritime lien for repairs or supplies—arising out of contract with the owner of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. A suit by the owner of a tow against her tug for an injury to the tow by negligence on the part of the tug is a suit *ex delicto* and not *ex contractu*.

*Carriers of Goods—Freight.*—*Moran Bros. Co. v. No. Pac. R. R. Co.*, 53 Pac. Rep. (Wash.) 49. When a carrier demands a sum in excess of the sum due for freight charges, the consignee need not tender any sum before bringing suit (*Adams v. Clark*, 9 Cush. 215); also, if the carrier has negligently



delayed delivery of goods, or otherwise subjected itself to liability for damages in respect to the property carried, equal to or greater than the amount of the freight, the consignee may obtain replevin without a tender; and the claim for damages may be adjudicated in the replevin suit.

*Carriers—Passengers—Extraordinary Care.*—*Southern Ry. Co. v. Smith*, 86 Fed. 292. *Held*, that where one who has a passenger ticket in his pocket, but has not been to the depot, nor in any way notified the officers or agents of the company that he intends to take passage, crosses the tracks to board an outgoing train, he is not a person to whom the company owes a duty of extraordinary care and diligence as a passenger. McCormick, J., dissented.

*Executory Contract—Repudiation by one Party—Resulting Right of Action.*—*Marks v. VanEeghen et al.*, 85 Fed. 853. Where one party to an executory contract renounces it, without cause, before the time for performing it has arrived, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages, and if the latter elects to treat the contract as terminated, his right of action accrues at once. But the evidence of the intention to repudiate the contract must be unequivocal. This decision is contrary to that of *Daniels v. Newton*, 114 Mass. 530, approved in the recent case of *Clark v. Casualty Co.*, 67 Fed. 222. Also, the court considers as *dicta* the observations to the same effect in *Smoot's Case*, 5 Wall. 36, and *Dingley v. Oler*, 117 U. S. 490; and that the Supreme Court of the United States has never passed upon the question directly. The present conclusion is considered by the court to be in line with the preponderance of adjudication, beginning with the leading English case of *Hochster v. DeLaTom*, 2 El. and Bl. 678.

*Contract to make Will—Specific Performance.*—*Edson v. Parsons et al.*, 50 N. E. Rep. (N. Y.) 265. Two sisters, closely united by affection, and in habits, associations and ideas, and who were also very much attached to a brother, made their wills at the same time and under the supervision of, and after consultation with, their counsel. The wills were alike, each sister giving to the other three-fourths of her residuary estate, and the remainder of the other fourth, after certain legacies were paid. It was further provided that if the testatrix should survive her sister, or if her sister, surviving her, should die before her will was proved, all the residue of her estate should go to her brother. Upon the death of one of the sisters, the other made a different will, and upon her death the brother sought to establish the provision of the first will as a contract between the sisters to give their property ultimately to him. *Held*, that the making of the wills and the attendant circumstances, were not sufficient, as a matter of law, to establish a contract such that a court of equity would interfere to prevent the surviving testatrix from altering by making a subsequent will. To invoke such an interference there must be a clear and definite contract, arising from an express agreement or from unequivocal facts.

## INSURANCE.

*Insurance—Accident Policy—Injuries in a Passenger Conveyance.*—*Aetna Life Ins. Co. v. Vandecar*, 86 Fed. 282. An accident policy of insurance provided that "if such injuries are sustained while riding as a passenger

in a passenger conveyance using steam, cable, or electricity as the motive power, the amount to be paid shall be double the sum above specified." *Held*, Thayer, J., dissenting, that these words do not apply to one riding on the platform of a railway car.

*Fidelity Insurance—Construction of Contract.—American Surety Co. v. Pauly*, 18 Sup. Ct. Rep. 552. A contract of fidelity insurance contained a clause providing that the company should be notified of any act on the part of the employe whose fidelity was insured which might involve a loss for which the company would be responsible "as soon as practicable after the occurrence of such act shall come to the knowledge of the employer." *Held*, that this did not require notice on mere suspicion, but that when the employer had knowledge of such facts as would justify a careful and prudent man in charging another with fraud and dishonesty, the fidelity company should be notified.

*Insurance by Life Tenant—Resulting Trust.—Spalding v. Miller*, 45 S. W. (Ky.) 462. A life tenant of buildings had them insured for their full value in fee simple. On loss the insurance company paid him the full amount. *Held*, that in the absence of evidence of an intention on the part of the life tenant to insure for the benefit of the remainder men, the insurance money was not subject to a resulting trust in their favor for their share in the value of the buildings.

#### CONSTITUTIONAL LAW.

*County Officers—Power of Appointment.—State ex rel. Williams et al., v. Mayhew et al.*, 52 Pac. Rep. (Mont.) 981. The constitution of the State of Montana provided generally for the election or appointment of county officers. In an action of *quo warranto* to test the validity of the appointment of such officers chosen by the Legislature to serve provisionally in a newly-created county, it was *held* that although the constitution provided for such selection, yet the Legislature, having the power to create new counties, of necessity had the power to carry them into effect. A county cannot be said to be created by the sovereign power until it is endowed with the power and means to aid in these important matters of the State (see *People v. Hurlburt*, 24 Mich. 44).

*Right to Vote.—Williams v. State of Mississippi*, 18 Sup. Ct. Rep. 583. A provision in a constitution and laws made thereunder are not void as in contravention of the Fourteenth Amendment merely because aimed at the characteristics of the race. For members of other races would be equally debarred by the possession of these characteristics. Although a law, fair on its face and impartial in appearance, may be within the constitutional provision if administered by public authority with an evil eye and unequal hand so as to make unjust and illegal discriminations between persons of different races, yet this maladministration must be shown as a fact. The mere possibility or probability thereof is not enough.

*Inheritance Tax—Class Legislation.—Magoun v. Illinois Trust and Savings Bank*, 18 Sup. Ct. Rep. 594. "An inheritance tax is not one on succession. The right to take property by devise or descent is the creature of the law, and the law may therefore impose conditions upon it." It is a privi-

lege—not a natural right. A State may distinguish, select and classify objects of legislation, and must necessarily have a wide range of discretion. The Fourteenth Amendment requires only that the law shall operate equally and uniformly upon all members of the class. It must appear not only that a classification has been made, but that it is reasonable and is based on some difference that bears a just and proper relation to the attempted classification and is not merely arbitrary. The Illinois inheritance tax law is valid. Though the classification in accordance with which the tax varies is more or less arbitrary, yet it is based on reasonable grounds and does not deny the equal protection of the laws.

*Ex-post Facto Law—Jury Trial.*—*Thompson v. State of Utah*, 18 Sup. Ct. Rep. 620. It is *ex-post facto* legislation to make a jury in a criminal case consist of only eight jurors instead of twelve when the crime was committed before the act was passed. When provision was made in the United States Constitution for trial by jury in criminal cases, it was intended that the jury should consist of twelve men. This was binding on territories. Hence a State cannot legally convict a man on verdict of eight jurors when his crime was committed before the admission of the Territory as a State.

#### **LIBEL.**

*Libel per se—Malice.*—*Cady v. Brooklyn Union Pub. Co.*, 51 N. Y. Supp. 198. A false publication of a practising dentist that he had committed suicide is libellous *per se* both as it touches him in his profession and as it is calculated to bring him into general ridicule. Malice need not be shown except in case of words qualifiedly privileged. It never is an essential ingredient in the action for damages for an ordinary slander or libel. It has to do only with the question of smart money.

*Matter Libelous per se.*—*McFadden v. Morning Journal Ass'n*, 51 N. Y. Supp. 275. Defendant published an article concerning plaintiff, a young lady, describing an alleged rowing race between her and another young lady as "a race for a beau with a handsome face." Names were given and the young man was described as being present, while "fair feminine friends" "encouraged each earnest, anxious aspirant." *Held* that the article was libellous *per se*, as its effect was to bring plaintiff into contempt and ridicule.

#### **PROCEDURE.**

*Action for Rent—Estoppel of Tenant—Real Party in Interest.*—*Melcher v. Kreiser*, 51 N. Y. Supp. 249. Plaintiff made a lease with the defendant, lessee, describing himself "as attorney and agent for the owner, lessor." *Held*, that lessee was estopped to deny the existence of the relation of landlord and tenant between himself and plaintiff, as attorney. *Held*, further, that under the code the plaintiff and not those for whom he might have been agent was the proper person to sue, since he was the only party of the first part thereto, and were this not so he might have maintained the action since a contract had been made in his name for the benefit of another, and he became thereby the trustee of an express trust.

*Pleading—Jurisdiction of the Supreme Court.*—*Kipley v. People of Illinois*, 18 Sup. Ct. Rep. 550. A mere allegation that a State statute is unconstitutional and void will be taken to refer a contravention of the State constitution, and is not sufficient to give the United States Supreme Court jurisdiction as over a federal question.

#### MISCELLANEOUS.

*Monopolies—Unlawful Restraint of Trade.*—*John D. Park & Sons Co. v. Nat'l Wholesale Druggists Ass'n et al.*, 50 N. Y. Supp. 1064. An agreement between manufacturers and wholesale druggists, whereby any customer of one of them who violates the agreement with the one in respect to cut-rate prices, is precluded from purchasing drugs and proprietary medicines from any combination, is unlawful, as creating a combination in restraint of trade. A court of equity will enjoin anything done in the furtherance of such an agreement, but will not enjoin the obtaining or imparting information as to the manner in which the customer conducts his business, or his violation of any agreement with any specific manufacturer or wholesale dealer, nor will it enjoin any one of the combination from making an agreement with the customer fixing the price of sale of the goods purchased.

*Attorneys—Suspension—Grounds—Punishment.*—*State ex rel. State Bar Association v. Finn*, 52 Pac. Rep. (Ore.) 756. In an action for disbarment it appeared that the accused had filed in a case in the Supreme Court in which he was attorney pretended affidavits of various persons to which they had never sworn. *Held*, although it was proven such was the usual manner of administering oaths in such cases, and although the evidence in the affidavits was true, such conduct was a reckless and wilful disregard of principles inconsistent with professional obligations, for which the attorney was amenable to the court. Disbarment proceedings are not to punish the attorney, but to protect the court in the proper administration of justice.

*Commerce—Constitutional Law—Police Power—Pool Selling.*—*State v. Harbourne*, 40 Atl. Rep. (Conn.) 179. A State statute, prohibiting the business of transmitting money to any race track within or without the State, there to be placed or bet on horse races, is not unconstitutional, nor opposed to the power of Congress to regulate commerce between the States. Such statute is rather a police regulation to prevent gambling, and even though it incidentally affects interstate commerce it is valid (*Geer v. Connecticut*, 161 U. S. 519).

*Trades Unions—Rights of Members—Exclusion from Work.*—*Davis v. United Portable Hoisting Engineers et al.*, 51 N. Y. Supp. 180. This case, following *Allen v. Flood*, *held*, that members of trades unions as well as other individuals have a right to say that they will not work with persons who do not belong to their organization, and it makes no difference whether they say this themselves or through their organized societies. It is not illegal for an employer to insist upon employing members of one organization only, nor for the employee of one employer to refuse to work for him unless all his employees are members of one organization.

*Bicycle—Right of Way.—Taylor v. Union Traction Co.*, 40 Atl. Rep. (Pa.) 159. Where a bicyclist was riding in an opposite direction from a cart, but on the car tracks and in the same direction as the cars on that track, and a collision resulted whereby the bicyclist was injured by the cart, by reason of his refusal to turn out, *Held*, that the bicyclist could not recover damages, as a bicycle is not a vehicle within the ordinary meaning, and on an open highway, should turn out for a cart.

## MAGAZINE NOTICES.

The following are some of the leading articles appearing in late legal publications:

*Albany Law Journal:*

- May 7. The Graded Inheritance Tax, . . . Percy L. Edwards  
 28. Hugh S. Legare, . . . Walter L. Miller

*American Law Review—May-June:*

- The Danger Line, . . . Shepard Barclay  
 The Interpleader Doctrine of Independent Liability, . . . R. A. MacLennan  
 Contracts Concluded by Correspondence, . . . M. A. Hindenberg  
 The Use of the Army in Aid of the Civil Power, . . . G. Norman Lieber  
 Recognition of a New State. Is it an Executive Function? W. L. Penfield  
 Mutuality of Contracts: Promise for a Promise. Unilateral Contracts: Consideration, . . . Alfred F. Sears  
 A Man Twice Condemned, . . . Junius Parker

*The American Law Register—May:*

- Interference with Contract Relations, . . . Ernest Wilson Huffcut  
 Partnership Property, . . . George Wharton Pepper

*Central Law Journal:*

- May 13. The Mortgagor's Rights as Against the Mortgagee in Possession after Default, . . . Herbert N. Laffin  
 20. Absolute Privilege as a Legal Excuse in Libel Suits, . . . Flora V. Woodward Tibbits  
 27. Usury in Bonus or Commission, . . . James Avery Webb  
 Can a Married Woman Release her Right to Dower in Land in Missouri by a Separate Conveyance, . . . C. B. Ames  
 Attempts to Commit Impossible Crimes, . . . Francis J. Kearful

*The Greenbag—June:*

- Some Notes on Divorce, . . . George H. Westley  
 An Ante-bellum Law School, . . . A. M. Barnes

*Harvard Law Review—June.*

- The Present and Future of the Law of Evidence, . . . J. B. Thayer  
 Mandatory Injunctions, . . . Jacob Klein  
 The Bicycle and the Common Carrier, . . . L. M. Friedman

## BOOK REVIEWS.

*A Tabular Analysis of the Law of a Contract.* By James R. Jordan of the Law School of Cincinnati College. Cloth. W. H. Anderson & Company, Cincinnati, O., 1898.

This little book of Mr. Jordan's is the most successful attempt we have yet seen to convey in a clear and terse form the knowledge of a legal contract. The fundamental principles are set forth in a tabular scheme which enables the student to comprehend the subject with singular facility. The arrangement is into five headings—"Nature of a Contract," "Its Formation," "Its Operation," "Its Interpretation," "Its Discharge," and supplementary to this is a scheme of "Contracts in Agency." There are no case citations, the author not having intended to enter the field already occupied by "Benjamin's Principles of Contracts." We have never seen anything so valuable to the young student for purposes of review and it would make the whole subject of contracts much simpler and clearer for the beginner if he could read over these tables before taking up a text like Parson's which is too often confusing and minute for first-hand reading.

*A Tabular Analysis of the Law of Evidence Especially Adapted to Greenleaf on Evidence.* Arranged by A. G. Turnipseed of the Cincinnati Bar. Cloth. W. H. Anderson & Co., Cincinnati, O., 1898.

This little book is exactly similar to the preceding, and quite as valuable as forming a basis for the more detailed study of evidence.

*Notes on the Revised Statutes of the United States.* July 1, 1889-January 1, 1898. By John M. Gould, author of "The Law of Waters," etc., and George D. Tucker, author of "The Monroe Doctrine," etc. Sheep. Little, Brown & Company, Boston, 1898.

This volume is a supplement to the "Notes on the Revised Statutes of the United States and the Subsequent Legislation of Congress," published in 1889, and completes the annotation of the Federal Statutes up to January of this year. The merits of the former volume are so well known that it is scarcely necessary to say that this one is indispensable to all lawyers who may be concerned with Federal statutes since 1889. The decisions of the State and Federal courts and the rulings of the Treasury Department and Attorney General's opinions are included in the annotations.

## SUPPLEMENT

CONTAINING

## MEMORABILIA ET NOTABILIA.

The graduation exercises of the Law School take place on June 27th. The annual meeting of the Yale Law School Alumni Association will be held at the Law School building at 1 P. M., when luncheon will be served. The alumni will march in procession thence to College Street Hall, where the Townsend Prize speaking will take place, followed by an address to the graduating classes to be delivered by Hon. Charles Andrews, LL.D., ex-Chief-Justice of the Court of Appeals of New York.

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The Wayland Prize debate was held in College Street Hall on the evening of May 26th. Unlike former years, the competition was not restricted to members of the Senior class. The judges were Hon. Charles Phelps, Secretary of State of Connecticut; Judge L. W. Cleveland of New Haven, and Mr. C. W. Pickett of New Haven. The subject for debate was, "Resolved, That Church property used exclusively for religious purposes should be exempted from taxation." The contestants spoke in the following order: Affirmative, H. Hewitt, 1900, L. M. Sonnenberg, 1900, J. M. Shepard, P. G., J. B. Ullman, '99; negative, C. E. Hinman, '99, C. H. Studinski, 1900, and E. P. Arvine, '99. The first prize, of \$50, was awarded to J. M. Shepard; the second prize, of \$30, to C. H. Studinski; the third prize of \$20, to L. M. Sonnenberg.

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The following were officers of the Kent Club during the past year: Presidents, C. A. Fuller, D. V. McNamee and E. W. Beattie, Jr.; Vice-Presidents, H. B. Chase, E. W. Sherman, T. F. Noone; Treasurer, A. S. Pratt; Secretaries, T. F. Noone, H. B. Agard and A. W. Powell; Critics, E. W. Beattie, Jr., W. H. Clark and D. V. McNamee.

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The Hon. William L. Wilson, LL.D., President of Washington and Lee University, delivered the W. L. Storrs lectures during the past year. His subject was "The Origin and Growth of Parliamentary Rule."

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Professor E. G. Buckland is about to edit a book on "Leading Cases in Evidence."



The following gentlemen delivered lectures before the Kent Club during the past year: Hon. H. C. Robinson of Hartford, Conn., on Jonathan Trumbull; Mr. Chas. H. Clark of Hartford, Conn., on "Mexico of Today;" Col. N. G. Osborne of New Haven, Conn., on "Journalism;" Hon. Charles J. Bonaparte of Baltimore, Md., on "Bosses and Rings," and the Hon. Joseph L. Barbour of Hartford, Conn., on "Little Things in Big Russia."

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The Hon. John W. Hendrie of Sound Beach, Conn., has donated \$15,000 to the Law School Building Fund, making a total of \$50,000 given by him.

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The Townsend speakers with their subjects have been announced as follows: Edward William Beattie, Jr., Yale '95, of Helena, Mont., on "The True Naval Policy of the United States;" Gilbert Lawrence Hedges, Yale '96, of Oregon City; Joseph Oudinot More, Yale '96, of New Haven, and Samuel Peterson, Yale '95, of Los Angeles, Cal., all on "The Debt of Virginia to Jefferson."

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The following members of the Senior class have been awarded Kent Club Diplomas for efficiency in debate in the Kent Club: E. W. Beattie, Jr., C. A. Fuller, G. L. Hedges, J. F. Douglas and D. V. McNamee.

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The Law Library has recently received from the estate of the late Leonard A. Bradley, Esq., '57 L.S., of New York, about two hundred volumes and pamphlets, being a part of his professional library. The books consist largely of statutes, digests, and reports of Connecticut and New York, and treatises, chiefly upon matters relating to real estate and probate law.

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President Dwight devoted a portion of his last annual report to showing the need of increasing the funds of the Law School. He made an appeal for an endowment of two hundred and fifty thousand dollars.































